

United States
Circuit Court of Appeals
For the Ninth Circuit.

CARSTENS PACKING COMPANY, a Corporation,
Plaintiff in Error,

vs.

LOUIS GODO,


Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Western District of Washington, Southern Division.

FILED

APR 11 1913



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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

JOHN D. FLETCHER, Esquire, Fidelity Building, Tacoma, Washington; and

ROBERT E. EVANS, Esquire, Fidelity Building, Tacoma, Washington,

Attorneys for Defendant and Plaintiff in Error.

GOVNOR TEATS, Esquire, Bernice Building, Tacoma, Washington;

HUGO METZLER, Esquire, Bernice Building, Tacoma, Washington; and

LEO TEATS, Esquire, Bernice Building, Tacoma, Washington,

Attorneys for Plaintiff and Defendant in Error.

(Caption.)

Praeceptum for Transcript.

To the Clerk of the Above-entitled Court:

Please prepare transcript of the following papers in the above-entitled cause, said transcript to be printed according to the rules of the Circuit Court of Appeals:

1. Complaint;
2. Answer;
3. Reply;
4. Deposition of S. P. Byars;
5. Supplemental complaint;
6. Motion to strike supplemental complaint;
7. Answer to supplemental complaint;
8. Defendant's requested instructions;
9. Verdict;

10. Petition for new trial; order denying petition for new trial;
11. Judgment;
12. Order granting stay of execution;
13. Petition for appeal;
14. Order allowing appeal;
15. Assignments of error;
16. Bond on appeal;
17. Bill of exceptions and order settling same.

Dated January 29th, 1913.

FLETCHER & EVANS,

Attorneys for Defendant and Plaintiff in Error.

[1*]

(Caption.)

Stipulation [Re Printing Record].

It is hereby stipulated between the plaintiff in error and the defendant in error in the above-entitled cause that the clerk of the above-named court shall eliminate, in printing the record sent by the trial court to him the following: All captions and verifications to all papers, except those to the complaint, and in lieu of such omitted caption and verification simply print the word "caption" and the word "verification." Said clerk shall also omit in printing said record all file-marks and admissions and proof of return or service.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error.

TEATS, METZLER & TEATS,

Attorneys for Defendant in Error. [2]

*Page-number appearing at foot of page of original certified Record.

In the United States Circuit Court, District of Western Washington, Western Division.

LOUIS GODO,

Plaintiff,

vs.

CARSTENS PACKING COMPANY, a Corporation,
tion,

Defendant.

Complaint.

Plaintiff complaining of defendant says:

I.

That the plaintiff is a citizen of the State of Washington, residing at Tacoma, Pierce County.

That the defendant, Carstens Packing Company, is at this time, and always was at all times herein mentioned, a corporation, organized and existing under the laws of the State of Maine, owning and operating a meat packing-house on the tide-flats near the city of Tacoma.

II.

That on the 27th day of May, 1911, and for some time prior thereto, plaintiff was in the employ of the defendant as a carpenter or millwright, under the defendant's master mechanic, Peter V. Cornils, doing such work as ordered by the said master mechanic in and about the plant of the defendant company.

III.

That in the construction of the elevator there was made and provided in the partition just north of the elevator-well a shaft leading from the floor of the wool-pulling house out through the different stories,

through which the counter-weight [3] of the elevator was made to run, and that for a long time before the accident to the plaintiff the counter-weight was allowed and permitted to go down through said shaft only to the floor, and there was a space below the floor and between the floor and the ground, a distance of about four feet, which was open, and through which the plaintiff and other men would pass when necessary, in their work about that part of the plant. That some time before the accident to the plaintiff, the cable or wire rope which was attached to the counter-weight broke and was replaced by a new wire rope or cable, and in attaching the counter-weight to the said cable or wire rope the said defendant carelessly and negligently attached the said weight to the said cable or wire rope, so that the said weight passed down through the floor and to within about five inches of the ground sill, and through the space where the plaintiff and other workmen were in the habit and were required to pass in their work in that part of the plant, so that in case a workman was passing through said space, and the counter-weight should go down, it would be dangerous to the man, in this, that it would catch him and crush him. All of which was unknown to the plaintiff at the time of the accident, or at all up to the time of being caught by said counter-weight, as hereinafter complained of.

IV.

That on the 27th day of May, 1911, it was necessary for the plaintiff to go under the building and under the ground floor of the wool-pulling house, and to pass out under the wharf in order to make certain

measurements at that place for the purpose of instilling a large vat. That the said master mechanic, Peter V. Cornils, knowing of the danger to the [4] plaintiff in passing through said space where the said counter-weight ran, and knowing that the said counter-weight would not stop at the floor, as it used to do, and knowing that the said counter-weight would pass down through the floor and through said space, carelessly and negligently failed to warn the plaintiff of that danger, and carelessly and negligently ordered and instructed plaintiff under the said building, and to go under the wharf to make the said measurements, and the plaintiff, in obedience to the orders and directions of the said master mechanic, proceeded on his way to and when he had reached the said space where the said counter-weight went down through the floor, and not knowing that the said counter-weight would come down, and not knowing of the dangers awaiting him, and without fault on his part, the said counter-weight that was so negligently and carelessly constructed, came down through the floor, catching the plaintiff on the back, at about the clavicles, breaking four ribs at the back, at the center of the same and at the stirnum, and spraining and bruising the plaintiff's foot so that the plaintiff is maimed and injured for life.

V.

That the plaintiff is a carpenter by trade, earning and able to earn, before the accident, four dollars (\$4) per day, when working at carpentry, and ninety-two dollars (\$92.00) per month while working as millwright for the defendant company, but the

plaintiff has been unable to work at all since the accident and will be unable to work for a long time, due and owing to the injuries so received.

That the plaintiff was fifty-three years old at the time of the accident, and that he has suffered intense [5] pain and mental anguish from the injuries so received.

That plaintiff is damaged by reason of the injuries so received through the negligence of the said defendant in the sum of Five Thousand Dollars (\$5,000.00).

WHEREFORE plaintiff prays judgment against the defendant in the sum of Five Thousand Dollars (\$5,000.00), together with costs and disbursements herein.

TEATS, METZLER & TEATS,
Attorneys for Plaintiff.

State of Washington,
County of Pierce,—ss.

Louis Godo, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above-entitled cause, and that he has read the foregoing complaint, and that all the matters and things therein are true.

LOUIS GODO.

Subscribed and sworn to before me this 10 day of Aug., 1911.

[Notarial Seal] HUGO METZLER,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 11, 1911. Saml. D. Bridges, Clerk." [6]

(Caption.)

Answer.

Defendant answering plaintiff's complaint says:

I.

It admits the allegations contained in paragraph I of plaintiff's complaint.

II.

It admits the allegations contained in paragraph II of plaintiff's complaint.

III.

Answering the allegations contained in paragraph III of said complaint, it admits that just north of the elevator-well in the wool-pulling house is a shaft through which the counter-weight of the elevator operation between tongued uprights up and down which said counter-weight runs. It denies that said counter-weight at any time only operated to the floor of the wool-pulling house, but alleges the fact to be that the same, prior to about one year from this date, operated below the floor for a distance of about three to four feet, leaving a small space between it when down and the mud below, the tongued uprights, however, up and down which said counter-weight operated, extending all the way down to the mud. It denies that the distance between the floor of the building and the ground or mud below is only about four feet, and alleges the fact to be that such distance was about seven feet; in other words, the

floor of the building was about seven feet high above the ground or mud. It denies that the plaintiff or other [7] men or anyone passed on the ground or mud under said counter-weight, or through the space below said counter-weight, and denies that there was at any time or at all any necessity, occasion or duty for the plaintiff or anyone else to pass under such counter-weight or through the space below the same. It denies that the wire, rope or cable attached to the counter-weight was repaired or renewed, and alleges the fact to be that said cable, about a year prior to this date, broke near the weight, and that it was then readjusted by simply taking one wind from around the drum and reattaching the same to the counter-weight, thus lengthening the same about three feet, and when thus lengthened it extended a little nearer to the ground or mud than formerly, and in this condition the same has ever since been and still is being operated. It denies that there was any carelessness or negligence whatsoever in attaching or readjusting said cable to said counter-weight, and alleges that the same was carefully and properly attached and readjusted and done in the usual and obvious manner as a part of the operations of said elevator. It denies that the space through which said counter-weight operates was a passageway or any other way of travel or passage, and denies that the plaintiff or other workmen or anyone were ever in the habit or ever required to pass through said space, or that there was ever any occasion for their so doing, and denies that anyone at any time ever passed through said space or that there was at any

time any work requiring anyone whatsoever to pass through the same. It denies that the plaintiff did not have knowledge of the matters and things charged and alleged in paragraph III of his complaint, but alleges that at all times [8] the plaintiff had full and complete knowledge of all the matters and things charged and alleged in said paragraph. And plaintiff specifically denies each and every allegation, matter and thing contained and set forth in paragraph III of plaintiff's complaint, except as in this paragraph admitted.

IV.

Answering the allegations contained in paragraph IV of plaintiff's complaint, it denies that on the 27th day of May, 1911, it was necessary for the plaintiff to go under the building or under the ground floor of the wool-pulling house, or to pass out under the wharf, and denies that at said time there was any work for the plaintiff to do either under said building or under said wharf, or that there was any occasion or reason for plaintiff to go under either of the same, and denies that at said time or at any other time it was necessary for the plaintiff to go under the wharf, and denies that the plaintiff could go under the wharf from under said building, and denies that there was any way to get under the wharf from under the building, and denies that there were any measurements for the plaintiff or anyone to make from under said wharf, and alleges the fact to be that the vat was to be let into the wharf outside of and adjoining the building, and not under it, and the measurements were to be made therefor

and could only be made therefor from outside of the building, and above the wharf, and not under the building or wharf. It denies that Peter V. Cornils or anyone had any knowledge that the plaintiff had any thought or idea of going under said house or through said space through which the counter-weight operated, but on the contrary, said Cornils knew that the work to be done by plaintiff was on the wharf outside of and [9] adjoining said building, and knew that the work could not be done by going under said building, all of which plaintiff likewise knew or by the least thought or observation should have known. It denies that there was any reason or occasion to give the plaintiff any warning regarding the things complained of. It denies that said Cornils or anyone ordered, directed or instructed the plaintiff under said building or under the wharf, or to go under either of the same or to make the measurements for said vat in any way or manner other than measuring the space for the same in the open air and adjoining said building and outside of the same, and on top of the wharf, and denies that anyone knew or had any information or thought that the plaintiff intended or expected to go under said building or to attempt to go under said wharf, and denies that plaintiff, in doing the things that he alleges he did do in going under said building and attempting to pass through the space within which said counter-weight operated, was acting under the orders, instructions or directions of said Cornils or anyone, and alleges that if plaintiff did do or attempt to do the things that he alleges, that the same were

contrary to the orders, directions and instructions given him, and the same were done by him upon his own volition. It denies that plaintiff did not then or for many months prior know that said counter-weight came practically down to the ground or mud, and denies that plaintiff was not fully acquainted with the dangers of attempting to pass under said counter-weight, and denies that plaintiff's attempted passing beneath said counter-weight was without fault on his part, and denies that said counter-weight was carelessly or negligently constructed, or constructed in any way or manner [10] other than in the usual, customary and obvious manner of construction. It denies that it has any knowledge or information sufficient to form a belief as to whether or not plaintiff attempted to pass beneath said counter-weight or as to whether or not said counter-weight caught plaintiff on the back, or otherwise, or at all, or whether or not the same caused plaintiff the injuries complained of or at all; it, however, admits that plaintiff, at the time in question, suffered an injury, but in a way and manner unknown to the defendant, and denies that the plaintiff is maimed and injured for life or maimed and injured in any other way or manner than in a slight degree,

Except as to the matters in paragraph IV of plaintiff's complaint either admitted by defendant or denied on information and belief, defendant denies specifically each and every allegation, matter and thing contained and set forth in paragraph IV of plaintiff's complaint.

V.

Answering the allegations contained in paragraph V, the defendant admits that plaintiff is a carpenter by trade, able to earn the sum of \$92.00 per month, and is fifty-two years of age, but specifically denies each and every other allegation, matter and thing contained and set forth in said paragraph. [11]

FOR A FIRST AFFIRMATIVE DEFENSE, defendant alleges as follows:

That whatever injuries plaintiff received were occasioned to him by his own negligence, and without negligence on the part of the defendant.

That plaintiff is a carpenter of long experience; had been working in defendant's plant for many years, and assisted in constructing the wharf referred to in his complaint. That the wharf is built over the mud on the tide-flats and about four feet high from it. That the wool-pulling house referred to in plaintiff's complaint is built over the wharf and about three feet above it. That the wharf extends just under the building, leaving an open space under the building of above seven feet from the floor of the building down to the mud. That the counter-weight referred to in plaintiff's complaint operates near the side of the building, running on two tongued uprights, which extend from the mud up through the building, leaving a space of about four feet between said uprights. That on each side of these uprights is a space of about fourteen inches wide, extending from the mud up to the floor of the building; that beyond the counter-weights the space under the entire building is open, the building being about seven

feet high above the mud, and all of this space, except that in which the counter-weight operates, is open and accessible to anyone going under the building.

That the counter-weight operates up and down in its fixed space and between the tongued uprights which run from the ground up through the building. That the side of the building where the vat alleged in plaintiff's complaint was to be placed, the same to be outside of the building and let [12] down into the wharf, extends to the mudsills below, and there is no opening from under the building to under the wharf, and it was and is impossible for anyone to go under the wharf, from under the building.

That about one year prior hereto, the cable attached to the counter-weight broke near the weight, and the same was then readjusted by taking a wind of the cable from around the drum and reattaching the cable to the counter-weight, thus lengthening the cable to a slight extent, approximately three feet, and allowing the weight to reach near the mud when the elevator was at the top of the building, and the same has been so operated ever since, and approximately a year prior hereto. That for many years prior to said last-mentioned time said counter-weight came to about three feet above the mud and about four feet below the floor of the building, but the tongued uprights up and down which the counter-weight travels have always extended to the mud, and said counter-weight has always operated up and down this fixed space.

That for several days just prior to plaintiff's injury he had been working near said counter-weight under the building, and had full knowledge of the operations of said counter-weight, and full knowledge of the conditions under said building, and full knowledge of all the matters and things hereinabove in this defense alleged.

That prior to the date of plaintiff's injury plaintiff had completed his work under said building, and that on that day plaintiff was directed by Peter V. Cornils, acting for defendant, to make certain measurements of a vat to be let into the wharf outside of and adjoining said building, and to measure the same from the outside of the building and [13] along the top of the wharf, and to tear up a plank in the wharf in order to find the supporting timber below to which the measurements was to extend. That defendant or anyone had no idea or thought that plaintiff would attempt to make such measurement by going under the building and thence under the wharf. That it was and is impossible to get under the wharf from under the building, or in any other way, or to make said measurements in that manner.

That unknown to the defendant plaintiff, after receiving directions to make said measurements as aforesaid, for some reason of his own, and entirely voluntarily and without any order or direction so to do, or any reason, necessity or occasion so to do, went under said building, but for what purpose defendant does not know, and in some manner received the injury he complained of, but how and in what

manner defendant has no knowledge, but alleges that the same was not received in any work or employment of plaintiff.

That on each side of the space in which said counter-weight operates under said building there is a space of about seven feet high and fourteen inches wide, through which plaintiff or anyone could, if occasion required it, pass with safety. That beyond said counter-weight, the entire space under said building, about seven feet high, is entirely open, anywhere, in which plaintiff or anyone, if occasion required it could pass in absolute safety. That there was at the time of plaintiff's injury and at all times during the daylight, a good light under said building as the sides of said building are open for about three feet above the wharf, and all said space under said building, and said counter-weight have good light for the same and the same are open and obvious to anyone under said building. [14]

That by reason of the matters and things hereinabove in this defense set forth, the plaintiff, if he was injured as he claims he was by attempting to pass under said counter-weight, received his injury through his own fault and negligence, and without any fault or negligence on the part of the defendant.

FOR A SECOND AFFIRMATIVE DEFENSE defendant alleges:

That all of the conditions and surroundings under said building alleged in plaintiff's complaint and the operations of said counter-weight were and are open and obvious, and are the usual and customary condi-

tions, surroundings, operations and constructions; that there were and are no latent or concealed defects or dangers; that all such surroundings, operations, dangers and risk of injury were and are open and known to the plaintiff at the time of his injury, and for many months prior thereto, and whatever dangers or risks of injury there were, the same were only such as are necessary and usual in such construction and operation, and were at all times understood and assumed by the plaintiff, and whatever injury there was occasioned to him was occasioned to him through dangers and risks of injury known to and assumed by him.

WHEREFORE defendant having fully answered plaintiff's complaint, prays that plaintiff take nothing by this action, but that the same be dismissed and that the defendant recover judgment against the plaintiff for its costs and disbursements herein.

FLETCHER & EVANS,

Attorneys for Defendant.

Office & P. O. Address: 909 Fidelity Bldg., Tacoma,
Pierce County, Wash.

(Verification.) [15]

(Caption.)

Reply.

Now comes the above-named plaintiff and replying to the affirmative defenses set forth in defendant's answer says:

I.

That the plaintiff denies each and every allegation set forth in the first affirmative defense in de-

fendant's answer inconsistent with the allegations of the plaintiff's complaint.

II.

That the plaintiff denies each and every allegation set forth in the second affirmative defense in defendant's answer inconsistent with the allegations of the plaintiff's complaint.

TEATS, METZLER & TEATS,
Attorneys for Plaintiff.

(Verification.) [16]

(Caption.)

**Deposition of S. P. Byars, a Witness on the Part of
the Plaintiff.**

THIS IS TO CERTIFY that on the 10th day of October, 1912, there appeared before me, Leo Teats, a notary public in and for the State of Washington, at 510 Bernice Bldg., Tacoma, at the hour of 2 o'clock P. M. of said day, Hugo Metzler, one of the attorneys for the plaintiff herein, and John Fletcher, one of the defendant attorneys, for the purpose of taking the deposition of S. P. Byars, who is at the present time in Tacoma, Washington, and about to leave the State. Said deposition being taken in the above-entitled cause pursuant to a stipulation duly entered into by the attorneys for the respective parties herein. The original stipulation being on file with the clerk of the above-entitled court. That at the hour of 2 o'clock P. M. this 10th day of October, 1912, S. P. Byars was sworn by me under oath to tell the truth, the whole truth and nothing but the

(Deposition of S. P. Byars.)

truth, and the taking of said deposition was commenced and proceeded to the close without adjournment as follows: [17]

S. P. BYARS, witness on the part of the plaintiff, being first sworn, testifies as follows:

Direct Examination.

(By Mr. METZLER.)

Q. What is your name? A. S. P. Byars.

Q. Where do you live?

A. 1102 No. Prospect Street.

Q. Are you expecting to leave the State of Washington? A. Yes.

Q. Where are you going?

A. Edmonton, Alberta.

Q. You expect to be gone throughout this month and next? A. Yes, sir, that time and longer.

Q. Are you familiar with the counter-weight that operated the elevator? A. Yes.

Q. The one where Mr. Godo was injured?

A. Yes.

Q. Did you assist in repairing the counter-weight cable prior to the time Godo was injured?

A. Yes.

Q. Do you know when Godo was injured?

A. I know the time but I can't recall the date.

Q. How long before Godo was injured did you repair the cable? A. It was six or eight days.

Q. After you had repaired the cable, did you notice how far the counter-weight stopped above the ground and mud? A. Yes.

Q. How much space was there between the ground

(Deposition of S. P. Byars.)

and the counter-weight when the counter-weight was clear down after you made the repair?

A. I would say five or six inches. [18]

Q. What position did you hold there at the time of repairing the cable?

A. I was millwright at that time.

Q. Under whose orders did you repair the cable?

A. Mr. Cornils'.

Q. What position did Cornils hold at that time?

A. He was master mechanic.

Q. Do you know what position Godo had?

A. Carpenter.

Q. Under whose orders was Godo working?

A. That I couldn't say.

Q. Was Mr. Cornils present when you made the repair on the cable? A. No.

Q. Did you consult him as to what alterations you were making? A. Yes.

Q. Did you take off one of the winds from the drum? A. Yes.

Q. Did Mr. Cornils know the method in which you repaired the cable? A. Yes.

Cross-examination.

(By Mr. FLETCHER.)

Q. There wasn't anything the matter with the cable or counter-weight, except the cable broke?

A. That's all.

Q. Where was this break relative to the place where the cable was attached to the counter-weight?

A. Direct, next the counter-weight.

A. There is an eye-bolt in the counter-weight and

(Deposition of S. P. Byars.)

cable is fastened in the eye-bolt and it broke right in the eye-bolt.

Q. And the repairs you speak of consisted in taking a wind of the cable from around the drum and reattaching the cable to the eye-bolt? [19]

A. Yes.

Q. You think this was about six or eight days before Godo was hurt? A. Yes.

Q. Have you anything by which you can fix that time? A. Nothing except memory.

Q. How long were you fixing the counter-weight?

A. I think a little over a day.

Q. Who told you to fix it? A. Mr. Cornil.

Q. Who, if anybody, assisted you?

A. Yes, Mr. McArthur.

Q. Where is Mr. McArthur now?

A. That I couldn't tell.

Q. Can you give me his first name and where he lives?

A. I couldn't tell you the number of his house, but he lives in McKinley Park. His first name is Bill.

Q. Is he also a millwright?

A. He was at that time.

Q. Where did you go in fixing the counter-weight, you and McArthur?

A. He went down on the ground where the counter-weight was.

Q. Was the counter-weight still in the groove up and down which it operated?

A. I think about two and the rest were sunk in the ground.

(Deposition of S. P. Byars.)

Q. Where was Louis Godo when you were fixing the counter-weight? A. That I couldn't say.

Q. Do you know whether or not he knew that you had fixed the counter-weight?

A. Yes, he knew that I was working at it.

Q. Did you ever see Godo under the building near where the counter-weight operated? [20]

A. You mean at any time?

Q. Yes. A. Yes.

Q. How many times? A. I could not say.

Q. More than once? A. Yes.

Q. Do you recollect when was the last time before he got hurt seeing him or knowing that he was under the building?

A. I am sure it was two years before this time.

Q. How long before Godo got hurt were you working for the defendant? A. About six years.

Q. You are not working for defendant now?

A. No.

Q. When did you leave the defendant's employ?

A. Sometime last February.

Q. Why was it you left the defendant's employ?

A. It was more on account of my partner than anything else.

Q. Who is the partner you refer to?

A. McArthur.

Q. The fact is, you were discharged by the defendant?

A. No, I don't think so. I think I quit myself.

Q. Why is it you think you quit yourself and were not discharged?

(Deposition of S. P. Byars.)

A. I quit because my partner was discharged and I *was sympathy* for him.

Q. Isn't it a fact that you and your partner got drunk and Mr. Cornil fired your partner on that account? A. No, it is not a fact that I got drunk.

Q. How about your partner?

A. He was not drunk either; both drinking some, but not drunk. [21]

Q. Where were you when Godo got hurt?

A. I think I was in the main building; that would be the killing-house.

Q. Did you assist Godo after he was hurt?

A. Nothing more; only I think I helped putting him in the ambulance.

Redirect Examination.

(By HUGO METZLER.)

Q. How much of the original cable was destroyed when you made the repair? That is, about how many inches in length?

A. I would judge about 10 or 12 inches.

S. P. BYARS.

(Verification.) [22]

(Caption.)

Supplemental Complaint.

And now comes the plaintiff, Louis Godo, and after first having obtained permission of the Court to file this, his supplemental complaint herein, states:

I.

That the original complaint herein was drawn on

or about the 10th day of August, 1911. That the plaintiff was injured on the 27th day of May, 1911, and while seriously injured as set forth in his complaint and maimed and injured for life, the plaintiff herein did not believe but that in the course of a year he would be able to do some sort of light work. That at the time of making and filing his original complaint herein, the plaintiff herein was suffering from injuries to his back in the lumbar regions, but the plaintiff herein was in hopes and thought and believed that the injury to his back was not so permanent as to totally disable him from work, but at this time the plaintiff alleges and says to the Court that fifteen (15) months have elapsed since the making and filing of his complaint. That the plaintiff at this time is in no better condition than he was at the time of the filing of his complaint.

II.

That the injury to his foot and back are such that the plaintiff has been unable to work at all since the accident except on two (2) certain occasions, which the plaintiff undertook to work at light work, but which the plaintiff at each occasion was required and compelled to cease work and due and owing to his injuries and his physical condition resulting from [23] the injuries received at the accident as set forth in the plaintiff's complaint.

III.

That the injury so received the plaintiff now states to be permanent to such an extent that the plaintiff will not be able to work at his trade at all for the balance of his lifetime. That the plaintiff is dam-

aged by reason of the injuries so received through the negligence of the defendant in the sum of Ten Thousand (\$10,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Ten Thousand (\$10,000.00) Dollars, together with his costs and disbursements herein.

TEATS, METZLER & TEATS,
Attorneys for Plaintiff.

(Verification.) [24]

(Caption.)

Motion to Strike Supplemental Complaint.

Comes now the defendant by its attorneys, Fletcher & Evans, and moves the Court for an order striking from the files herein the supplemental complaint filed on this date, for the following reasons:

First: It moves to strike the first and second paragraphs thereof because the same are merely argumentative and a pleading of evidence.

Second: For the reason that said complaint is not in proper form, and amendment should be by amended complaint.

Third: That the application for leave to amend was not made until the calling of this case for trial. That the supplemental complaint sets out an *addition* and further injury than the original complaint, of which defendant was not advised when it answered herein and prepared its defense.

FLETCHER & EVANS,
Attorneys for Defendant. [25]

(Caption.)

Answer to Supplemental Complaint.

Comes now the defendant and for answer to the supplemental complaint filed herein, and without waiving its objections thereto and motion to strike the same, alleges and says:

I.

Referring to paragraph I of said supplemental complaint, defendant has no knowledge or information sufficient to form a belief as to the same, and therefore denies the same.

II.

Defendant denies the allegations contained in paragraphs II and III of said supplemental complaint.

FLETCHER & EVANS,
Attorneys for Defendant.

(Verification.) [26]

(Caption.)

Defendant's Requests for Instructions.

You are instructed to return a verdict in this cause in favor of the defendant.

If the instruction for directed verdict in favor of defendant is refused, then defendant, saving an exception to such refusal and without waiving the same, requests the Court to instruct the jury as follows:

No. 1.

In this case the plaintiff seeks to recover damages against the defendant. Plaintiff claims that defendant failed to perform its duty to him on account of

which he received an injury.

He bases his right to a recovery on the ground that the defendant had allowed the counter-weight to the elevator formerly to stop at the floor of the building, but that some time before the day of his injury a new cable was attached to the counter-weight which allowed the counter-weight to pass below the floor of the building down to about five inches of the ground. That from the floor of the building to the ground was a space of about four feet in height; that the workmen in defendant's employ were in the habit and in the performance of their work were required to pass under this counter-weight; that he did not know of the change in regard to the counter-weight coming down near to the ground.

That on May 27, 1911, it was necessary for him to go under the building in order to get under the wharf to make measurements for a vat. That Mr. Cornils was his boss and knew of the danger in passing under the counter-weight and [27] knew of the change in the operation of the counter-weight but did not warn him, but, on the contrary, ordered and instructed him to go under the building and thence under the wharf to make the measurements, and that he in obedience to such order went under the building, and as he was passing under the counter-weight it came down and caught him producing his injury.

There is no evidence that the elevator or the counter-weight were in themselves defective or improperly operated, or that it was wrong in itself to have the counter-weight come down to the ground. The charge is that it did not formerly come below the

floor, and that some time before plaintiff's injury it was changed and allowed to do so. That under the counter-weight was a passageway for the workmen and that at the time of his injury he was specifically ordered by his boss, whom he claims knew of the change in the operation of the counter-weight, to go under the building without telling him of this change, and that in the performance of his duties he went under the counter-weight in ignorance of the change and was hurt.

The defendant has answered, and for its defense states that the counter-weight operated along tongued uprights which extended all the way to the ground and up through the building. That this building is built over the tide-flats and about three feet above the wharf; that the wharf is about four feet above the ground and extends just under the building, leaving an open space of about seven feet from the ground to the floor of the building. That the space between which the counter-weight operates, is about four feet wide, and is near the side of the building. That [28] on each side of it is a small space about fourteen inches wide. That all the rest of the space under the building is open and safe for one to walk about, and about seven feet high above the ground. That prior to an accident, about the 21 day of January, 1911, the cable on the counter-weight allowed the counter-weight to come to about four feet below the floor of the building, or about three feet from the ground. That about that time the cable broke near the counter-weight; that wind of the cable was taken from around the drum and reattached to

the counter-weight which lengthened the cable about three feet so that from that time the counter-weight came down when the elevator went to the top, to almost the ground. That this was the condition at all times from then until plaintiff was injured.

Defendant further claims that plaintiff is an experienced carpenter and had been in its employ for many years, and helped build the wharf in question. That the side of the building where the vat was to be placed extends all the way down to the mudsill, and there was no way to get under this part of the wharf by going under the building. That for some days before plaintiff's injury he had worked under the building near the counter-weight, and knew where it was located and how it operated, and knew that all the space under the building except where the counter-weight came down, and the two small spaces on each side was open, so that one could go in safety wherever he pleased under the building, except under the counter-weight.

Before the day of plaintiff's injury he had finished his work under the building and there was no occasion or duty requiring him to then go under the building. That on [29] the day in question defendant wanted a vat let into the wharf just outside of and adjoining the building, and wanted the space measured for a vat, and Mr. Cornils directed the plaintiff to make these measurements and took him to the place outside of the building where the measurements were to be made, and directed him to tear up the plank in the wharf in order to find the supporting timber to which the measurement was to be made.

That plaintiff had no duty or occasion to then go under the building, and that the defendant or its employees did not know that plaintiff intended to go under the building, and without defendant's knowledge or the knowledge of its employees the plaintiff, for some reason of his own, went under the building and received an injury in some manner unknown to the defendant.

That on each side of the counter-weight is an open space of seven feet high and fifteen inches wide; that other than this space and the counter-weight space the entire underpart of the building is open and safe for walking about in and about seven feet high from the ground. That the building is about three feet above the wharf and the wharf extends just under the side and end of the building, leaving the space under the building with light sufficient for anyone to see and observe the conditions under the building, and to see and observe the counter-weight space, and the other spaces, and that if plaintiff was injured by the counter-weight coming down upon him, it was, for these reasons, his own and not the defendant's fault.

The defendant also claims that the conditions and surroundings under the building and the space in which the counter-weight operated were all open and observable, and were [30] the usual and customary conditions, construction and operation; that there were no hidden dangers; that plaintiff knew, or by the use of his eyes and faculties could have known, of the conditions and the operations of the counter-weight and of the dangers of passing

under the counter-weight, and that these open and apparent conditions and operations and dangers were assumed by the plaintiff when he entered defendant's employ, and for that reason he cannot hold the defendant responsible for his injury.

No. 2.

If an employee gets injured while doing something his duty does not require him to do, and he has no order to do, and the same is not done in the performance of his required employment, he has no right to hold his employer responsible for his injury, and if in this case the plaintiff had no occasion to go under the building and was not directed to go under the building, and his employment at that time did not require him to go under the building, then he cannot recover in this action, and your verdict must be for the defendant. [31]

No. 3.

If you find that the construction under the building and the operations of the counter-weight were the usual constructions and operations, and the same were all open and obvious, then though the plaintiff had some duty requiring him to go under the building, and those directing him did not warn him of the operations of the counter-weight, still if he knew the conditions and the operations of the counter-weight, or if the same were open and apparent so that they were observable to ordinarily careful persons, then the plaintiff could not recover, for the law does not require an employer to warn an employee of conditions, operations or dangers when the same are known to the employee or can, by

ordinary use of his eyes and faculties be observed by him. [32]

No. 4.

If you find that the space under the building was open and afforded safe passage, except the space occupied by the counter-weight, and though you should find that the plaintiff's duty required him to go under the building, yet if you further find that, for some reason of his own, he went under the counter-weight knowing that it was above him or by the use of his eyes could have known that it was above him, instead of his using the open space under the building which afforded safe passage, he cannot hold the defendant responsible for his voluntarily using the unsafe way. [33]

No. 5.

An employer, when he has in his employ a man of experience and mature judgment, does not have to warn or instruct such employee about the usual operations of a factory, or open and ordinary dangers attendant upon such operations, when the same are open and obvious to such employee. For it is presumed that an employee of experience and mature judgment will observe these things for himself, and as a matter of law in doing his work he is held to assume these ordinary and usual risks and dangers, and if he receives an injury from operations that are usual, customary, open and obvious, he cannot complain, and if in this case the operations of the counter-weight were usual and customary, in the work of this kind, and were open and obvious, and no duty requiring plaintiff to place himself in a

place of danger under the counter-weight, and if the way under the counter-weight was not a used way, and the entire balance of the space under the building was open and safe and plaintiff knew of these conditions, or by the use of his faculties should have known them, he cannot recover in this action but your verdict must be for the defendant. [34]

No. 6.

Plaintiff does not claim in his evidence that the construction of the building was unsafe or the construction and operations of the counter-weight were unsafe, but his claim is that the counter-weight formerly only came to the floor of the building, and that some time before his injury the cable had been lengthened so that the counter-weight came below the floor and down to near the ground, and that he did not know about this change. He further claims that the way under this counter-weight was a used passageway for the employees in defendant's plant. Now, if you find that this change had been made about ——— months before plaintiff's injury and that after the change he had worked under the building near the counter-weight, then the defendant had a right to believe that the plaintiff had used his eyes and had observed the operations of the counter-weight and the conditions under the building, and that though you should find that Mr. Cornils directed the plaintiff to go under the building at the time of his injury, yet neither Mr. Cornils nor the defendant could be charged with a failure of duty in not warning the plaintiff of the operations of the counter-weight, for an employee does not have to be warned

of dangers known to him or which he has had reasonable opportunity to observe. And if you should find that the way under the counter-weight was not a used way, and that the balance of the space under the building was open and safe, then neither the defendant nor Mr. Cornils could be charged with knowledge that the plaintiff was going under the counter-weight, but would have a right to presume that plaintiff would use his eyes and would take the safe course under the other part of the building.

[35]

No. 7.

If you find from the evidence that the vat was to be installed outside of the building, and that the measurements for it were to be made outside the building, and that Mr. Cornils, who was directing the plaintiff in his employment, knew that one could not get under the wharf to make the measurements by going under the building, then neither the defendant nor Mr. Cornils could be charged with knowledge that plaintiff was going to attempt to make the measurements by going under the building.

And even if you should find that Mr. Cornils knew that plaintiff was going under the building to make the measurements, still the defendant would not be liable unless you further find that the plaintiff did not know of the operations of the counter-weight or by the use of his eyes in his former work under the building could not reasonably have observed its operation. And even in this case, if you should find that the way under the counter-weight was not a used

way and that the balance of the space under the building was open and safe, and that the plaintiff voluntarily used an unsafe way without the knowledge of the defendant or Mr. Cornils, then the defendant would not be liable. [36]

No. 8.

If you find that a vat was to be let down into the wharf outside of the building, and the measurements were to be made outside of the building, and that Mr. Cornils took plaintiff to the place outside of the building and showed the plaintiff where to make the measurements and directed him to tear up a plank in the wharf to find the supporting timber from which to make the measurements, and give him no order to go under the building, and did not know that he would attempt to make the measurements by going under the wharf from under the building, and that plaintiff, notwithstanding these directions from Mr. Cornils, if you believe he so directed the plaintiff, of his own volition went under the building because he believed he could more easily make his measurements in that way, then by the plaintiff's failure to follow the directions of Mr. Cornils and assuming to do the work in his own way, his injury would be the result of his own fault and the defendant would not be responsible therefor, and your verdict must be for the defendant. [37]

No. 9.

The Court instructs you that before the plaintiff is entitled to recover in this action he must prove all the material allegations of his complaint by a fair preponderance of the evidence. By preponderance

of evidence is meant, by the greater weight of the evidence; that is, the evidence most convincing to your minds, and in determining upon which side of the case the evidence preponderates, you should take into consideration all the facts and circumstances testified to on the trial, the apparent fairness or lack of fairness of any witness, the interest or lack of interest of any witness, and the apparent fairness or candor with which the witnesses testified, their demeanor on the witness-stand and all the facts and circumstances surrounding the trial, and from all the evidence and the facts and circumstances you are to determine upon which side the evidence preponderates. If the plaintiff fails to prove his case by a fair preponderance of the evidence, then your verdict must be for the defendant. [38]

No. 10.

You are instructed that for the plaintiff to recover it is necessary for you to find that the evidence preponderates in favor of the plaintiff that his injury was caused by defendant's negligence as plaintiff has alleged it. By preponderance of evidence is meant such evidence as is more convincing to your minds, and in this case if, after hearing all the evidence your mind is not more convinced in favor of plaintiff that his injury was caused by defendant's negligence as he alleges it, that is, if your mind is left evenly balanced as to whose contention is right, then plaintiff would not be entitled to recover, but your verdict should be for the defendant. [39]

No. 11.

You are instructed that in this case if you believe

from the evidence that the plaintiff was an experienced man in the line of work in which he was engaged on the day of his alleged injury, and was familiar with the risks and dangers incident to such work, if any such existed, and if you further find from the evidence that the injury to plaintiff occurred through the happening of an event ordinarily incident to such line of work, then the plaintiff assumed all the risk of such injury when he entered upon such employment and he cannot recover in this cause. [40]

No. 12.

You are instructed that where a servant is guilty of negligence himself, or fails to exercise ordinary care and caution, and such negligence or such failure to exercise ordinary care and caution contributed to his injury to such an extent that the accident would not have occurred but for such negligence of the servant or failure to exercise ordinary care and caution, then the servant is guilty of contributory negligence and cannot recover. [41]

No. 13.

You are instructed that if you believe from the evidence that the plaintiff in going about his work chose to go about it and chose to remain in such place as would subject him to injury, and that his acts were not those of an ordinarily careful and prudent person under the circumstances, then said plaintiff was guilty of contributory negligence and he is not entitled to recover in this case and your verdict should be for the defendant. [42]

No. 14.

You are instructed that if you believe from the evidence in this case that there were two ways or methods of doing the work in question at the time plaintiff claims to have been injured, one of which methods was safe and the other dangerous and both were equally open and apparent to plaintiff, and that he voluntarily chose the dangerous way and was injured, then he is guilty of contributory negligence and cannot recover in this cause. [43]

No. 15.

You are instructed that the master does not owe any duty to a servant to warn him of dangers which are open and apparent, and as readily observable by the servant as by the master, and if in this case you should find from the evidence that the counter-weight and the uprights upon which it operates were in plain view and its condition open and apparent, and the plaintiff, by the exercise of his faculties and ordinary care, could have avoided the injury from said counter-weight, then you are instructed to find a verdict for the defendant. [44]

No. 16.

In this case there has been evidence that the men who fixed the cable after it broke laid down planks on each side of the counter-weight space to stand on, and it is argued that this constituted an invitation to Godo to use that way at the time he was injured. In regard to this matter you are instructed that unless you find that the plaintiff or its officers, or those in charge of its business, knew that the planks had been so laid, or from all the circumstances should

have known it, then the defendant would not be charged with knowledge of this situation and would not be charged with having invited the plaintiff to use this way. And though you should find against the defendant on this point, yet if you should further find that the plaintiff thoughtlessly and carelessly, and without taking the precautions that an ordinarily prudent person would take, placed himself in a known dangerous position or in a position that from the use of his eyes and faculties he should have known to be dangerous, and if it was his carelessness and negligence and failure to act as an ordinarily prudent person would have acted that caused his injury, then he cannot recover. [45]

(Caption.)

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at the sum of SIX THOUSAND FIVE HUNDRED Dollars (\$6,500.00).

CHARLES A. BROWER,

Foreman. [46]

(Caption.)

Judgment.

This cause coming on for trial before the Court and a jury on the 25th day of November, 1912,—plaintiff appearing in person and by his attorneys, Teats, Metzler & Teats, and the defendant appearing by its attorneys, Fletcher & Evans, the jury being duly impaneled, the cause proceeded with the intro-

duction of testimony from day to day, until Wednesday, the 27th day of November, 1912, when the cause was submitted to the jury for its decision; whereupon the said jury retired, and thereafter, on Friday morning, November 29th, 1912, brought into court its sealed verdict, which verdict was thereupon unsealed. Said verdict being in favor of the plaintiff and against the defendant, and assessed the plaintiff's damages in the amount of Six Thousand Five Hundred (\$6,500.00) Dollars. Thereupon said verdict was filed in said cause. And now, on this 2d day of December, 1912, on the motion of plaintiff for judgment on said verdict,—

IT IS CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, Louis Godo, have and recover judgment against the said defendant, Carstens' Packing Company, a corporation, and judgment is hereby rendered in his favor and against said defendant in the sum of Six Thousand Five Hundred (\$6,500.00) Dollars, together with his costs and disbursements to be taxed according to law.

DATED THIS 3d DAY OF DECEMBER, 1912.

EDWARD E. CUSHMAN,

Judge.

To all of which judgment and the entry thereof defendant excepted and its exceptions are allowed.
[47]

Done this 4th day of December, 1912.

EDWARD E. CUSHMAN,

Judge. [48]

(Caption.)

Petition for New Trial.

Comes now the above-named defendant, Carstens Packing Company, and petitions this Honorable Court for a new trial of this cause and the issues herein on the following grounds, to wit:

I.

Irregularity in the proceedings of the Court, the jury and the plaintiff and the abuse of the Court's discretion by which the defendant was prevented from having a fair trial.

II.

Misconduct of the plaintiff and of the jury.

III.

Excessive damages, appearing to have been given by the jury under the influence of passion and prejudice.

IV.

Error in the assessment of the amount of the recovery by the jury in that the same is too large.

V.

Insufficiency of the evidence to justify the verdict and that the same is against law.

VI.

Errors in law occurring at the trial and excepted to at the time by the defendant, which errors materially affected the results of this cause in favor of the plaintiff and against the defendant.

VII.

That the recovery is against the great weight of the evidence. [49]

FLETCHER & EVANS,
Attorneys for Defendant.

(Verifications.) [50]

(Caption.)

Order Denying New Trial.

This cause coming on for hearing on petition for new trial, filed and entered by defendant company, plaintiff appearing by his attorneys, Teats, Metzler & Teats, and the defendant appearing by its attorneys, Fletcher & Evans, and after argument of the said petition, same was submitted to the Court, and the Court finds that the same should be overruled;

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant's petition for new trial be and the same is hereby overruled, to which ruling defendant excepts and exceptions allowed.

Dated this 23d day of December, 1912.

EDWARD E. CUSHMAN,
Judge. [51]

(Caption.)

Order Granting Stay of Execution.

This cause coming on duly for trial, and the jury having returned its verdict, and before the discharge of the jury the defendant having moved for a stay of execution in this cause until sixty days after the motion for new trial herein is disposed of, and the Court having announced in open court on said motion that said stay was granted—

NOW, THEREFORE, IT IS BY THE COURT ORDERED that execution in this cause be, and the same is hereby, stayed for a period of sixty days from and after the date upon which the motion for

new trial herein is disposed of, said stay being granted to allow defendant time to prepare bill of exceptions on appeal in this cause.

Done in open court this 4th day of December, 1912.

EDWARD E. CUSHMAN,

Judge. [52]

(Caption.)

Petition for Appeal.

The Carstens Packing Company, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 3d day of December, 1912, comes now by Fletcher & Evans, its attorneys, and petitions said Court for an order allowing said defendant to prosecute a writ of error in the Hon. United States Circuit Court of Appeals for the 9th Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the 9th Circuit.

And your petitioner will ever pray.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error, Defendant in
Lower Court.

(Verification.) [53]

At a stated term, to wit, the July term, A. D. 1912, the District Court of the United States of America, in and for the Western District of Washington, Southern Division, held court in the courtroom in the City of Tacoma and County of Pierce, in said District, on the 27 day of January, in the year of our Lord one thousand nine hundred and thirteen. Present, the Hon. EDWARD E. CUSHMAN, District Judge.

(Caption.)

Order Allowing Appeal.

Upon the motion of J. D. Fletcher, Esq., and Robert E. Evans, Esq., attorneys for the defendant, and upon the filing of a petition for writ of error and assignments of error,

IT IS ORDERED that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals, 9th Circuit, the judgment heretofore entered herein; and that the amount of the bond in said writ of error be and hereby is fixed at \$14,000.00; that upon the giving of such security all further proceedings in this court to be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the 9th Circuit.

EDWARD E. CUSHMAN,
District Judge. [54]

(Caption.)

Assignments of Error.

Comes now the defendant in the above-entitled

cause and files the following assignments of error upon which it will *reply* for a prosecution of the writ of error in the above-entitled cause.

First. The Court erred in denying the motion of defendant for nonsuit in this cause made at the close of the plaintiff's case in chief. Said motion being made upon the following grounds:

"1st. That the plaintiff has failed to prove a cause of action as laid in his complaint.

2nd. That there is an absolute failure of proof of any negligence on the part of the defendant.

3rd. That the accident was due to contributory negligence and want of due care and caution on the part of the plaintiff.

4th. That the condition was open and apparent and plaintiff assumed whatever risk there was."

(Defendant's motion and the Court's denial of the same appear on pages 126, 127, 128, 129.)

Second. The Court erred in permitting the trial amendment to the complaint by the filing of a supplemental complaint.

Third. The Court erred in overruling defendant's motion to strike supplemental complaint.

Fourth. The Court erred in refusing to grant defendant's first requested instruction for a directed verdict. Said requested instruction appearing in Bill of Exceptions, page 256, and being as follows:

"You are instructed to return a verdict in this cause in favor of the defendant."

Fifth. The Court erred in allowing the jury to take with them, for use in the deliberation upon their verdict, the supplemental complaint filed by the

plaintiff herein at the trial. Said direction to take supplemental complaint appearing in the first part of the Court's instruction to [55] jury found on page 234 of Bill of Exceptions, line 10.

Sixth. The Court erred in instructing the jury as follows:

"The master is under a positive duty, owes the positive duty to his employee, to provide the employee with a reasonable safe place in which to do his work. This duty being one that is positively imposed upon the master in the first instance, he will not be excused from its performance by entrusting it to another charged with the duty to make performance for him but who neglects to perform that duty, but the master is not an insurer of the lives and limbs of his employees."

Said instruction being found on page 236 of the Bill of Exceptions, commencing with line 7. The same being excepted to by the defendant, which exception appears on page 254 of the Bill of Exceptions, commencing with line 24.

Seventh. The Court erred in instructing the jury as follows:

"The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If on account of changes in the construction of the master's premises and appliances the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exer-

cise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in [56] the exercise of ordinary care for his own safety, the master would be under no duty to warn the servant, and would not be negligent in failing to warn the servant."

Which instruction is found on pages 238 and 239 of the Bill of Exceptions, commencing with line 18 on page 238. Which instruction was excepted to by defendant, said exception commencing on line 30, page 254 of the Bill of Exceptions and continuing on page 255.

Eighth. The Court erred in instructing the jury as follows:

"If you should find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are

instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence.”

Said instruction being found at page 239 of the Bill of Exceptions, commencing with line 15, and the defendant’s exception thereto being found on page 255, commencing with line 30 and continuing on page 256.

Ninth. The Court erred in denying defendant’s petition for a new trial of this cause.

WHEREFORE said defendant, plaintiff in error, prays that the judgment of said court be reversed, and that said District Court be directed to enter a judgment herein in favor of the defendant and against the plaintiff, dismissing this action on his merits, or if said judgment of [57] dismissal is not proper, then that said District Court be directed to grant a new trial of this cause.

FLETCHER & EVANS,
Attorneys for Plaintiff in Error, Defendant in Lower
Court. [58]

(Caption.)

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Carstens Packing Company, a corporation, as principal, and A. V. LOVE and L. L. LOVE, as sureties, are held and firmly bound unto Louis Godo, plaintiff above named, in the sum of FOURTEEN THOUSAND Dollars, to be paid to said Louis Godo, his executors or administrators, which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 29th day of January, A. D. 1913.

WHEREAS, the above-named defendant, Carstens Packing Company, has sued out a writ of error to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Washington:

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant, Carstens Packing Company, shall prosecute said writ to effect and answer for all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

CARSTENS PACKING COMPANY,

By THO. CARSTENS,

President.

A. V. LOVE.

L. L. LOVE.

(Verification.)

The above bond and sufficiency of the sureties on the same are hereby approved this 29th day of January, A. D. 1913.

EDWARD E. CUSHMAN,
Presiding District Judge. [59]

[**Bill of Exceptions.**]

*In the United States District Court, Western District
of Washington, Southern Division.*

Case No. 1850—C.

LOUIS GODO,

Plaintiff,

vs.

CARSTENS PACKING CO.,

Defendant.

BE IT REMEMBERED that heretofore and on the 25th day of November, A. D. 1912, the above-entitled cause coming regularly on for trial before the Honorable E. E. CUSHMAN, Judge of the above-entitled court, and

The plaintiff being present in person and represented by his attorneys, MESSRS. TEATS, METZLER & TEATS, and

The defendant being represented by its attorneys, MESSRS. FLETCHER & EVANS,

The following proceedings were had and done:
[60]

Mr. TEATS.—If the Court please, we have agreed upon an amendment to the complaint, the 18th line, — page, by inserting, “And injuring the lumbar region of his back.”

The COURT.—Take the complaint and amend it on the file, and the clerk will initial it.

Mr. TEATS.—It was sometime since this action was begun, and I would like to change our prayer from five thousand to ten thousand dollars.

The COURT.—Without filing a supplemental complaint?

Mr. TEATS.—Yes.

The COURT.—Any objection?

Mr. EVANS.—We object to the amendment at this time, if the Court please.

Mr. TEATS.—It is not any part of the complaint, only the prayer.

The COURT.—The objection is sustained, without the supplemental complaint.

Mr. TEATS.—Very well. I would like to prepare the supplemental complaint then.

The COURT.—State the general facts that you will embody in the supplemental complaint so that we will know whether both parties are ready for trial.

Mr. TEATS.—I will state the facts to be, at the time this complaint was made we were expecting immediate recovery or soon recovery, in a very reasonable time. This complaint was made on the 10th day of August, 1911, and more than a year has passed and instead of any recovery the plaintiff has become worse, and his conditions are worse to-day than they were when this complaint was made up. [61*—1†]

The COURT.—You do not intend to allege additional injuries that have manifested themselves but

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

simply that the recovery is not as speedy as expected.

Mr. EVANS.—He is asking for more money.

Mr. TEATS.—That is true, but we have amended by agreement, “And injuring the lumbar region of his back,” which is an injury that has come on as a part of this accident and which was not so serious before, and we passed it up at the time of making this complaint.

The COURT.—Very well, the supplemental complaint may be filed, and it will be considered denied.

Mr. EVANS.—Note an exception to the ruling of the Court in permitting the supplemental complaint at this time, for the reason the application is not timely.

The COURT.—Exception allowed.

Thereafter, and on the 25th day of November, 1912, the jury having been sworn to try the cause, the following proceedings were had:

Mr. EVANS.—If the Court please, at this time, before proceeding further, I desire to state that counsel this morning while I was in court served a supplemental complaint upon me, and I just served on him a motion to strike that supplemental complaint from the files, on the ground that it is immaterial and irrelevant and a great deal of it is not proper in any sense of the word. Yesterday he asked leave to amend the prayer of his complaint, and that was granted over our objection. [62—2]

The COURT.—You objected to the amendment to the prayer. I sustained the objection unless he made some allegation to show wherein he was in a different position now from what he was at the time he filed

his complaint, and so he filed the supplemental complaint.

Mr. EVANS.—Which complaint do we go to trial on—the original complaint or the supplemental complaint, or both?

The COURT.—You go to trial on both.

Mr. EVANS.—I would like to have the record to show my objection and exception.

The COURT.—You were given an exception. This is simply the reducing to writing of the motion made on yesterday.

Mr. EVANS.—Yes, but I think he goes stronger in this complaint than he asked yesterday.

The COURT.—Of course, the total amount of the prayer is now ten thousand dollars. It would not be ten thousand dollars on the supplemental complaint and five thousand dollars on the original. The motion denied and exception allowed.

Mr. EVANS.—I would also at this time like to have the appearance of Mr. C. F. Wilt noted as one of the attorneys for defendant.

The COURT.—Mr. Wilt's appearance will be noted.

Thereupon the plaintiff having stated to the jury the facts which he expects to prove in the trial hereof,

The following proceedings were had and done:
[63—3]

The plaintiff, to sustain the issues upon his part, offered the following evidence:

[Testimony of J. E. Belcher, for Plaintiff.]

J. E. BELCHER, who being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. J. E. Belcher.

Q. What is your business?

A. Assistant treasurer, Carstens Packing Company.

Q. What do you do as assistant treasurer?

A. Why, look after the credits and financial transactions—the financial end of the business.

Q. Do you have anything to do with the claims?

A. I do.

Q. Do you have anything to do with the lawsuit in question? A. I beg pardon?

Q. Do you have anything to do with this case?

A. Not particularly; no.

Q. Ain't you helping to work it up, collecting facts and records and so on? A. Yes.

Q. You are familiar with the premises over there, are you not? A. I am.

Q. Look at Identification "A." Can you recognize for the purpose of explanation the premises in question in this case? A. Yes, sir.

Q. This is the old glue-house (indicating on Ident. "A"). This [64—4] is only for the purpose of explanation. I am not familiar with the measurements; I do not say that this is a correct measurement. A. That appears to be it.

Q. The red lines here would indicate the elevator

(Testimony of J. E. Belcher.)

shaft? A. Yes.

Q. The elevator-well? A. Yes.

Q. And the large heavy line over here indicates the ringer? A. Yes.

Q. And another dark line there marked "tank." Is this the tank? A. Yes.

Q. That is the one they were installing at the time of the accident? A. Yes.

Q. The dotted lines along here would show the platform before the new addition was put on?

A. I do not recall that platform.

Q. Have you any records to show when the foundations for the ringer was put in? A. I think so.

Q. Can you produce them?

A. I think I can. That was approximately the early part of April.

Q. Have you got anything that would show when exactly? Do your records show?

A. No, the record I have here does not show.

Q. Have you the records of this you say?

A. They are somewhere in the office, yes.

Q. Are they not here? [65—5] A. No, sir.

Q. What sort of records are they?

A. Well, it would be material that was purchased for that particular work and a record of the time the men put in building the form. The concrete was put in by contract work.

Q. Do you know who did the work?

A. A man by the name of Smith.

Q. I will ask you at this time to produce the record

(Testimony of J. E. Belcher.)

to show the time when the cement foundation was installed.

Mr. EVANS.—I will state for the benefit of counsel that we are perfectly willing to produce that record. It is not here. It is over at the packing-house. We certainly shall be glad to produce them.

The COURT.—You clearly understood what it is?

Mr. EVANS.—He wants the time-book, as I understand it, or whatever records they have that will show when the ringer foundation was built.

Mr. TEATS.—That is what I want.

Q. Can you tell when they commenced on the new addition to the glue-house?

A. We can tell that by our records; yes.

Q. Have you got the records here?

A. I have not.

Q. What have you got here—haven't you got the records here on that point?

Mr. EVANS.—We object to the question.

Q. You haven't them here? I noticed you were looking at a record. I did not know but what they were here. A. No, sir; I have not. [66—6]

Q. Can you state from memory when these things were done? A. No, I cannot.

Mr. EVANS.—Q. The only thing you know about that plat, is it, is illustrative; but you do not know whether it is correct or not? A. I do not know.

(Witness excused temporarily.) [67—7]

[Testimony of Louis Godo, in His Own Behalf.]

LOUIS GODO, the plaintiff, being called as a witness in his own behalf, testified as follows, after being duly sworn:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. Louis Godo.

Q. Where do you live?

A. 112 East Wright Avenue.

Q. How old are you?

A. I will be 54 next birthday.

Q. When are you 54? A. The 10th of May.

Q. What is your business?

A. Well, my business has been carpenter by trade.

Q. How is that?

A. I have been a carpenter by trade.

Q. When did you come to this state?

A. I came to Tacoma in '88, the 28th day of June.

Q. What have you been following since that time?

A. Carpenter work mostly, except three years I was up in the Yukon; six years I was up in the Yukon.

Q. What? A. Up in the Yukon Territory.

Q. What years are they?

A. I went up there in 1898 and came out again in 1902.

Q. After coming back, who did you work for?

A. Carstens Packing Company, most of the time.

Q. What did you work at?

A. Carpenter work and millwrighting. [68—8]

Q. Under whom did you work?

(Testimony of Louis Godo.)

A. Under Mr. Cornils.

Q. What was he? A. He was master mechanic.

Q. Anybody else?

A. The last year I was working there I had a foreman by the name of Charlie Lundgren.

Q. Mr. Cornils is the man sitting here (indicating in the courtroom)? A. Yes, sir.

Q. How long did you work for him when you first went to work?

A. I don't know for sure whether it was in '92 or '93.

Q. 1902 or 3?

A. 1900, yes,—on the 11th day of October.

Q. 1902?

A. I am not positive whether it was 1902 or '3, the 11th of October.

Q. How long did you work there?

A. I worked there until 1906 in September, the first Saturday after Labor Day.

Q. During the time you were working there, was what they call the glue-house constructed?

A. No, sir; it was constructed the last summer I was there or the last winter.

Q. That is what I am asking you.

A. That was constructed the last summer.

Q. Was that built?

A. It was built before I left, yes.

Q. What year was that built in?

A. It was built in 1906, in the winter. [69—9]

Q. When did you go back to work after 1906?

A. In May, 1910.

(Testimony of Louis Godo.)

Q. What did you do then?

A. When I went to work there again?

Q. Yes.

A. Went to work at carpenter work as usual, and millwrighting.

Q. Millwrighting?

A. Millwrighting and carpenter work.

Q. Under whom did you work?

A. Well, sometimes I got my instructions from Mr. Cornils and sometimes from Charlie Lundgren.

Q. Were they still superintendent and foreman over there? A. Yes, sir.

Q. Of what department?

A. Over all the mechanical department, building and construction.

Q. Did you say you commenced in May, 1910?

A. Yes, sir.

Q. And when did you quit?

A. I quit when I got hurt, the 27th day of May, 1911.

Q. Worked over there about a year? A. Yes.

Q. Now, during the time you were working there, did you work around the glue-house? A. Yes, sir.

Q. Look at Identification "A"; do you recognize that? A. Yes.

Q. What is it?

A. That is the underground floor of the glue-house.

Q. I wish you would just explain to the jury the situation [70—10] over there before the building of the new addition.

A. I can do so. This is the line of the old building,

(Testimony of Louis Godo.)

and there is the elevator shaft (indicating on plat).

Q. The one in red is the elevator shaft?

A. And there is the platform which used to be from the building before.

Q. How wide was that platform?

A. About six feet.

Q. How high above the wharf?

A. About three feet. Not over three feet, about.

Q. What do you mean by the wharf?

A. The wharf is the platform or floor where they drive in to all around there. It is all built on piling, the whole thing, you may say.

Q. Just like a wharf?

A. Just like a wharf; yes.

Q. About how far is the wharf above the tide-flat or ground or mud?

A. In some places there is mud clear up to the wharf, and in some places there is small holes through and through, and in some places there is dry wood under it.

Q. How much does it go above the mud?

A. As far as I went around here and along here (indicating).

Q. Around the glue-house, you mean, from the corner?

A. From the corner of the glue-house out that way (indicating) it is about six inches from the mud up to the cap lying on the piles.

Q. How far would that be from the wharf?

A. The cap, I do not know whether it is 12 by 12 or 12 by 14, and there is a 12 by 14 joist on top of that. [71—11]

(Testimony of Louis Godo.)

Q. How was it under the glue-house?

A. After you get inside of this line there (indicating), it is between a six and seven foot opening until you get to about here (indicating), back around the washer where they used to wash glue stock out in, and it gets down into the mud, and it gets lower here, and I should judge it is there about four feet in diameter.

Q. How far is it, then, from the tide-flats around in this direction east or north of the elevator-well?

A. Well, that is sloping off about four or five feet; it slopes down in here and slopes down in here.

Q. Did you ever work around the glue-house?

A. Yes, sir.

Q. When first?

A. The first time I worked there was in 1906.

Q. Whereabouts did you work?

A. I worked right opposite this washer, right up in here somewheres (indicating).

Q. How far away from the elevator-well and in what direction?

A. Well, I should judge about 25 or 30 feet from the elevator-well, southeast direction.

Q. Which way did you get there?

A. Well, I generally came in here (indicating) and went round in here. Sometimes we might have went out there (indicating), because in there was a space that was closed up with dirt, and there was an opening here and here was an opening.

Q. You mean it was closed up with dirt where it says "wall"?

A. About 13 or 14 feet up against the wall. There

(Testimony of Louis Godo.)

were boards stuck down to hold it back, and here was an opening and [72—12] over here was an opening (indicating).

Q. Where did you go the second time?

A. The second time—what's that?

Q. Did you go there a second time?

A. The first time I went through there I came through a little door about three feet square.

Q. When was this? A. This was in 1911.

Q. That is the second time you were in there?

Mr. EVANS.—Make a mark, please, where that door was.

A. Right about in here.

Mr. TEATS.—I will put a blue mark.

Q. About how many feet was the door from the corner? A. From the northeast corner?

Q. Yes, sir. A. About 25 feet.

Q. Which is north? A. That is the north side.

Q. It is hanging just right on the map, isn't it—north, east and south, isn't it? A. Yes.

Q. Twenty-five feet?

A. About 25 feet, something like that; I could not say for sure.

Mr. EVANS.—What is the scale of the map?

Mr. TEATS.—One inch of the map scales four feet.

Q. So that we will place a square there and call it "door." How big is that door?

A. About three feet square; might be a trifle more or less.

(Testimony of Louis Godo.)

Q. Was that out under the porch, under the platform? [73—13] A. Yes, sir.

Q. Now, we have another mark on this map called sill; what is that?

A. That is the beam that goes across there where the joists rest on.

Q. Which way do the joists lay?

A. The joists lay north and south.

Q. Were you there when they constructed the elevator? A. No, sir.

Q. They had that put in when you went back to work?

A. They had that when I came back to work from Aberdeen.

Q. What about Aberdeen?

Mr. EVANS.—We object to Aberdeen.

Mr. TEATS.—He was first working for you people at Aberdeen.

Mr. EVANS.—We object to that.

The COURT.—Objection sustained.

Mr. TEATS.—Q. This was during the year 1906. When you came back, when you went there, did they have this glue-house finished and the elevator installed?

A. Yes. Well, it was not finished, the machinery was not in. I helped put in the machinery.

Q. You helped put in the machinery? A. Yes.

Q. What machinery?

A. Oh, all kinds of machinery, motor and fans.

Q. Did you help install the elevator?

A. No, sir.

(Testimony of Louis Godo.)

Q. Did you see it used after it was installed?

A. I seen it, yes, sir.

Q. And how about the counter-weights, I wish you would describe [74—14] that to the jury, how they were first installed.

A. The counter-weights were installed so that they come down that way over the joist.

Q. How many inches is that?

A. That is close to six inches. Some places kind of stuck out more, sometimes less.

Q. Where did the counter-weights come down?

A. They came down right in that corner.

Q. What corner? A. The southwest corner.

Q. And out of the well? A. Out of the well; yes.

Q. Or shaft?

A. Out of the well and out of the shaft.

Q. And about where we find an opening here on that line? A. Yes.

Q. Let's put "elevator weight" there. How far above the ground did the elevator weight come to?

A. Went down.

Q. Yes; when it was first installed?

A. Well, when it was first installed it was about six feet from the ground to the joists, and the elevator weight came down to the joists.

Q. And what was below the weight?

A. There was the sill that this building was standing on.

Q. How large a sill?

A. I cannot say that, whether it was double 3 by 14, or 3 by 14; whether it was double or single, I am not sure.

(Testimony of Louis Godo.)

Q. And what did that do?

A. That held the wall of the building where the studs were [75—15] laid on to it, that made the wall.

Q. And did that go across the space where we have “elevator weight”? A. Yes.

Q. And where did the weights come to?

A. The weights come in to six inches above that when the elevator was first installed.

Q. Direct over it or how?

A. No; kind of sideways, on the side.

Q. On the inside part of it? A. Yes.

Q. Now, how large were these weights—do you know?

A. I should judge they are about seventeen or eighteen hundred pounds; something like that.

Q. Those weights were for what purpose?

A. To balance the elevator, the weight of the elevator.

Q. And what way do they go?

A. When the elevator went up the weights come down, and when the elevator come down the weights went up.

Q. Did you ever see the working of the weights before this, during 1906, when you were around there?

A. I seen the workings of the weights just,—I boarded them in there and I seen them. They are boarded in from the first to the second floor with ship-lap on the outside.

(Testimony of Louis Godo.)

Q. You did that work of boarding them in then?

A. Yes.

Q. What year? A. 1906.

Q. Did you ever have any occasion to use the space below the weights? [76—16]

A. Not since 1906.

Q. What time was it, then, and what did you do?

A. Before the time of the accident?

Q. Did you ever have occasion to look at them?

A. Yes.

Q. Tell the jury about that.

A. That is the time we fixed for the ringer foundation.

Q. About when was it you were working under the glue-house or the ringer foundation?

A. To the best of my knowledge it was between the 15th and 20th of April.

Q. Nineteen hundred and what? A. 1911.

Q. And who was working there with you?

A. Mr. Nelson or Olson.

Q. What did you do?

A. We put the plate down and put the studdings on and fastened them to the floor, and we put ship-lap on the outside.

Q. You were making a form for concrete work?

A. Concrete work; yes.

Q. That ringer foundation is made out of concrete, isn't it? A. Made out of concrete.

Q. Run the concrete in? A. Yes, sir.

Q. How were they using this elevator-way in this space below the elevator weight?

(Testimony of Louis Godo.)

A. Well, we come down to put in this form and there was about three feet of mud in the excavation, and we went up to Mr. Lundgren and asked him if we should take the water out, and he says, "No"; he says, "I will send Harmon [77—17] down"; he says—(interrupted.)

Mr. EVANS.—We move to strike that out.

The COURT.—Motion granted, and the jury instructed to disregard that part of the answer.

Q. Go on; tell what you saw.

A. He had a box running out through here (indicating).

Q. Out through where?

A. Out through there (indicating on Identification "A" at point marked counter-weight), and had four men standing by there and dipping water out of the plate, and two standing over this way (indicating), dipping water out.

Q. Just make a mark on the map with a blue pencil showing where that trough was and where it passed; make two lines—how wide was that trough?

A. It was made out of the whole width of the lumber, one by twelve for the bottom and one by twelve for the sides.

Q. What did they do with that trough?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is overruled.

A. They were getting water out of this pit.

Q. What were they putting in there? Taking out what—just water?

A. Water, yes; and dirt and mud.

(Testimony of Louis Godo.)

Q. Now, how long was that before your accident?

A. Well, that was between the 15th and 20th of April, 1911, to the best of my knowledge, and my accident was on the 27th day of May, 1911.

Q. At that time, where did the weight come down to when they had that trough through there?

A. Went to the floor. [78—18]

Q. Went to the floor of the building? A. Yes.

Q. Now, you may tell in your own way what you were doing and how you got hurt.

A. Well, Mr. Cornils come and told me to go under the wharf and get the measurements of this tank (indicating).

The COURT.—I cannot understand you.

A. Mr. Cornils told me to go down under the wharf and take the measurements for that tank, and I tried to get under the wharf at this corner (indicating).

Q. Put a mark with an X at the point where you tried to get under the wharf. At that time what had become of the platform?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is overruled.

A. The platform was torn away.

Q. And what was there?

A. There was the joists of this addition. There was an addition they built on there.

Q. So that you had to go under the floor of the new addition? A. Yes, sir.

Q. Now, go on and tell the jury.

A. This is the only place I had an opportunity to

(Testimony of Louis Godo.)

get under the wharf anywheres, and then I could not on account of the cap laid so close down to the mud or ground.

Q. Get under where?

A. Under this cap to get under the wharf.

Q. What do you mean by wharf?

A. The wharf is where—

Q. Outside of the building? [79—19]

A. Outside of the building, yes.

Q. That is over here to the north of the building, is that the wharf? A. That is the wharf.

Q. And all around here is wharf (indicating), isn't that? A. Yes.

Q. All right.

A. I could not get under there and so I asked, that is, I said to my partner—

Mr. EVANS.—We object.

The COURT.—Objection sustained.

Q. Just tell what you did.

A. "Got to go around the elevator there"—

Mr. EVANS.—We object and move to strike out what he said to his partner.

The COURT.—Objection sustained. Motion to strike granted.

Q. Who was working with you?

A. Mr. Nels Olson.

Q. Just state what you did before you went in there—what did you do?

A. Before I went in there?

Q. Yes; what did you do preparatory to going in there?

(Testimony of Louis Godo.)

A. I got a long pole about twenty feet long and a chisel.

Q. What for?

A. For to take the measurements with.

Q. All right.

A. And I took them with me and I could not get through, and so I came over here, and when I came over here I seen a broken timber here (indicating on the plat).

Q. Where did you see the broken timber? [80—20]

A. Right across here (indicating on plat).

Q. Where is that?

A. That is across where the elevator counter-weight comes down.

Q. All right.

A. I stopped and took a match and candle.

Q. What time of the day was this?

A. This was about ten or fifteen minutes past four in the afternoon.

Q. Why did you have to have a light?

A. Because I could not see any other way.

Q. Was it dark in there?

A. It was dark in there; yes.

Q. State in your own way what you did.

A. I lit the candle—the match, and held it on to the candle, and Mr. Olson—

Q. Show the jury. Which way were you standing?

A. Kneeling here on a plank on my knees. A fellow had put down the counter-weight, and as I held

(Testimony of Louis Godo.)

the match over to the candle the weight come down and struck me.

Q. Where did it strike you?

A. Struck me on my shoulders.

Q. What did it do to you?

A. It crushed me down into the mud, and that is the last I know about it.

Q. That is the last you know? A. Yes.

Q. Take a blue pencil and mark dotted lines across the course you came, from the starting place to the place of the accident, just dotted lines.

(Witness does so.) [81—21]

Q. From your own knowledge, from what would you say if you know were you hit?

A. I did not know what hit me.

Q. When did you first remember anything after being taken from the building?

A. After I got out of the wharf.

Q. What did you do then?

A. Well, they sent for a cab and took me to the hospital.

Q. What hospital did you go to?

A. St. Joseph's.

Q. How long did you stay at St. Joseph's Hospital? A. A little over four weeks.

Q. Then what did you do?

A. I went home, to my home.

Q. At your place of residence? A. Yes.

Q. What were the injuries received at that time?

A. Well, I got my foot, ligament in my foot all pulled out.

(Testimony of Louis Godo.)

Q. Which foot?

A. The left foot, and the doctor told me I had three ribs fractured and my back injured.

Mr. EVANS.—I move to strike what the doctor told him.

The COURT.—Motion granted. You will not repeat any conversations you had with anybody at any time.

Mr. TEATS.—I think it is proper to say what the doctor told him.

The COURT.—The motion is granted, and the jury instructed to disregard anything the doctor said.

Q. Now, how about your foot?

A. My foot has got a little better, but very little.

[82—22]

Q. What, if any, did you suffer from the time of your accident—just tell the jury if you suffered any pain.

A. Well, I was unconscious for two days. I did not know anything about what was going on, and I had to lay 11 days on my back, could not turn in bed, and since I have been walking around with the cane, all I could do to get around a little.

Q. Did you use crutches at first? A. No.

Q. Always a cane? A. Always a cane.

Q. What pain—have you suffered any pain?

A. Always suffered pain.

Q. How much?

A. Well, sometimes more and sometimes less. Sometimes I am not able to raise up in bed, and

(Testimony of Louis Godo.)

sometimes I can get up.

Q. Why are you not able to raise in bed?

A. Because my back is injured.

Q. Where does your back hurt you?

A. Right across the small of the back, up through the middle.

Q. How long has that hurt you?

A. Hurt me ever since I was hurt—hurts me to-day.

Q. How is it as compared with what it was a year ago?

A. Well, it is not a bit better than it was a year ago.

Q. How is your foot?

A. My foot is a little better than it was a year ago; very little.

Q. Have any trouble with your foot now?

A. No; so long as I keep it in plaster and bandages.

Q. Do you have it in bandages now? [83—23]

A. Yes, sir.

Q. Who bandages it?

A. My wife bandages it every morning, and I have plaster around it from the doctor.

Q. Who puts it in plaster?

A. Dr. Brown, Dr. E. M. Brown.

Q. And how about your back—do you receive any treatments—how do you treat that?

A. Well, that has plasters on and bandaged up, and around here (indicating) I have to have a big canvas belt.

(Testimony of Louis Godo.)

Q. Around the abdomen? A. Yes.

Q. And small of the back? A. Yes.

Q. Now, Mr. Godo, how much did you weigh at the time of the accident, about?

A. Weighed 215 pounds.

Q. And what was the condition of your health then? A. Good.

Q. How continuously were you at work before this accident? A. Every day.

Q. How much did you earn?

A. Ninety-two dollars a month.

Q. What had you earned when you were working for others at your trade?

A. Four dollars a day.

Q. Have you worked any since?

A. No, sir—well, I made two attempts.

Q. Tell the jury about the first time.

A. The first time I got a job night watching in a mill out [84—24] on Center street, and there were three clocks to ring in the night and in different parts of the mill and the mill was shut down, and I could not stand the walking, and so I had to quit the job on account of my foot, so much walking.

Q. How long was that after that accident?

A. It was last December.

Q. Last December? A. Yes, sir.

Q. How long were you on your feet then—how many hours were you compelled to be on your feet? I mean continuously.

A. I had to ring them bells every half hour.

Q. Every half hour?

(Testimony of Louis Godo.)

A. Yes, sir. From 9 o'clock at night until six in the morning.

Q. How long did you work at that time?

A. I worked there a little over three weeks.

Q. And why did you quit?

A. I could not stand it, I had to quit, and the man told me if I would not clean the log deck and clean the bark and stuff off the log deck I would have to quit the job.

Q. Did you try to clean the log deck?

A. I tried to clean it but I could not do it.

Q. Why? A. On account of my back.

Q. Then when did you next go to work?

A. I went to work on the 20th of January at South Tacoma in the car-shops.

Q. What doing?

A. Well, putting sheeting on box-cars. [85—25]

Q. And what success did you have there?

A. Well, I worked ten days first, and then I was going to quit and the boss told me to keep on and I worked two days more, and I had to give it up.

Q. Why?

A. Because I could not stand it. My back gave out—my back gave out.

Q. Now, altogether, how much have you earned since you were injured?

A. I earned about fifty dollars in these two positions.

Q. About fifty dollars altogether?

A. About fifty dollars altogether; yes, sir.

Q. When you were first taken to the St. Joseph

(Testimony of Louis Godo.)

Hospital, who was your doctor? A. Dr. Braden.

Q. Was he your doctor?

A. He was appointed by the company to meet me there.

Q. Did you pay hospital fees?

A. We do that over there; yes, sir.

Q. You paid hospital fees over there? A. Yes.

Q. Did you pay that fee?

Mr. EVANS.—We object to that as immaterial, and move to strike it out as not within the issues of the case.

The COURT.—Objection sustained and it will be stricken. The jury are instructed to disregard it.

Mr. TEATS.—Save an exception.

Q. How long did he treat you?

A. Well, he treated me until, I think, it was the 7th or 8th of August. [86—26]

Q. What did he do? A. He didn't do nothing.

Mr. EVANS.—That is objected to as immaterial, not within the issues in the case.

The COURT.—Objection overruled. This simply goes to the method of treatment?

Mr. TEATS.—Yes.

Mr. EVANS.—There is no complaint here made of lack of treatment. We are not defending a malpractice action.

The COURT.—The objection may be overruled.

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed.

Q. Did you employ other doctors? A. Yes, sir.

Q. Who? A. I employed Dr. Quivle.

(Testimony of Louis Godo.)

Q. Any other? A. Dr. Reitz.

Q. And who else? A. Dr. E. M. Brown.

Q. How long has Dr. E. M. Brown been treating you?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection overruled.

A. Since the 5th of March.

Q. March when? A. 1911.

Q. 1911 or 12? A. 1912.

Q. Now, what pain did you first suffer and how much?

A. I cannot explain how hard I suffered. [87—27]

Q. Can't you explain it at all?

A. I could not raise in bed and I could not turn around in bed.

Q. Where was your pain mostly at that time?

A. In the sides and back.

Q. And whereabouts in the sides?

A. On this side (indicating right side), and on this side here.

Q. Below the short ribs?

A. In this side below the ribs around this way.

Q. Has that pain left you down below the short ribs? A. No, sir.

Q. Do you experience any pain now?

A. Yes, sir, every day.

Q. Under what circumstances?

A. Kind of dead pain in my back.

Q. Under what circumstances? Is it paining all the time or do you—

(Testimony of Louis Godo.)

A. Paining all the time; even if I sit still as I do now, it pains now.

(Recess, after which, the call being waived and the jury all being present, the trial is continued as follows:)

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Godo, how long have you been a millwright?

A. Since I started to work for Carstens Packing Company.

Q. Back in 1906? [88—28]

A. Well, before that; in 1903 and 4 I started in.

Q. There a couple of years at that time, approximately?

A. Well, I am not certain whether it was in October, 1902, or 3, I started to work for them.

Q. How many times had you worked underneath the glue-house?

A. Well, I had been working there occasionally off and on.

Q. Now, tell me how many times you had been working under there.

A. Well, in 1906 I put in shafting there.

Q. You put in shafting? A. Yes.

Q. Where did you put in the shafting?

A. I put it in the south side of the big washer.

Q. What you refer to as the big washer is that big tank that is situated over there (indicating on the plat)?

A. That is down on the floor, round tank.

(Testimony of Louis Godo.)

Q. That is over in here, that shafting is?

A. Yes, sir.

Q. That is fifty to one hundred feet from the counter-weights? A. No.

Q. How much?

A. It is about 25 or 30 feet.

Q. Twenty-five or 30 feet from the counter-weights? A. Yes, sir.

Q. That was in 1906? A. Yes, in 1906.

Q. How many times were you under there that time?

A. We were working there that spell about three days and then taken away and went back there again.

Q. How did you go in? I understand you at that time, you went in this little door over here? [89—29]

A. No, sir; there was no door then at the time we put that shafting in there.

Q. There was not any door?

A. No, sir; the platform was not put up there.

Q. The elevator was not constructed?

A. Yes; the elevator was constructed.

Q. The elevator was there? A. Yes.

Q. Where did you go in at that time?

A. We went in any place into there, along there and along there any place (indicating on the plat).

Q. You could go in under any place?

A. Any place; yes, sir.

Q. As a matter of fact, underneath the glue-house it was all open except that elevator-well and the up-

(Testimony of Louis Godo.)

rights where the counter-weights run, wasn't it?

A. No; there was a place there in front just opposite the glue-house where there was some dirt shovelled and some sticks stuck up and down to hold that dirt there.

Q. That is along where?

A. About 15 feet from the elevator.

Q. Fifteen feet from the elevator? A. South.

Q. This way? A. Yes.

Q. In this direction (indicating)?

A. There was an opening close to the elevator and there was an obstruction there about fifteen feet from the elevator.

Q. At that time you could crawl right along under here (indicating)? [90—30]

A. Yes, sir, you could go anywhere.

Q. And aside from that little obstruction at one place where there was dirt you could have free access under the whole of that glue-house?

A. Yes, sir, except where the elevator-well was and the counter-weights run, and the washer.

Q. That is the large tank over here?

A. Yes, sir.

Q. That was in 1906 you were working there putting the shafting in? A. Yes, sir.

Q. You observed the elevator and counter-weights at that time, did you not? A. Yes, sir.

Q. Was it light enough under there that you could see? A. It was before it was closed up.

Q. Before it was closed up? A. Yes.

Q. And you observed them at that time?

(Testimony of Louis Godo.)

A. Yes, sir.

Q. When did you next work under there?

A. I next worked under there in 1911, when I put in that foundation for that ringer.

Q. So that from 1906 to 1911, at the time you put the ringer foundation in there, you had never been under there?

A. Well, I was on small occasions, just to do some repairing.

Q. What small occasions?

A. Perhaps tighten up the boxes or tighten up the setscrews.

Q. Give me any specific time that you went under there. A. I could not give you that. [91—31]

Q. What did you go to fix?

A. Well, sometimes might have went to tighten a box.

Q. You say that you might have gone?

A. Sometimes I did.

Q. Are you positive you did?

A. Yes, sir, I did.

Q. When was that?

A. 1906. That was in 1906, and I was under there in 1910 and took out some of that conveyer.

Q. You do remember in 1910 about taking out some of the conveyer. A. Yes, sir.

Q. Where is that or where was it?

A. That conveyer is in the south side of the washer.

Q. That is over in here?

A. No, it is further up this way (indicating).

(Testimony of Louis Godo.)

Q. Over here (indicating)?

A. At that big tank.

Q. How did you get under there at that time?

A. I went in through that little door.

Q. At that time you went through this door, did you? A. Yes, sir.

Q. Did you observe the elevator and counter-weights at that time? A. Not in particular.

Q. Not in particular? A. No.

Q. Now, when did you next go under there?

A. That was when we built that foundation.

Q. Then the next time was when you built the foundation, was [92—32] it? A. Yes, sir.

Q. When you built the foundation, how did you go in there?

A. I went in through the door, that little door.

Q. In through that little door (indicating on the plat)? A. Yes.

Q. And that foundation was built in April and you were injured in May? A. Yes.

Q. Now, at that time I believe you testified you observed the elevator and counter-weights.

A. Yes, sir, I did.

Q. Had the break in the cable occurred at that time? A. No, sir.

Q. So that you now testify that the change in the counter-weights allowing them to come down was made after you built the ringer foundation?

A. Yes, sir.

Q. And you observed the counter-weights at that time so that you knew where they came to?

(Testimony of Louis Godo.)

A. I knew they did not come through the floor at that time.

Q. You mean you did not see them come through, don't you?

A. I did not see them come through, and I did not see the sill broken.

Q. What? A. I did not see the sill broken.

Q. The sill broken? A. Yes.

Q. That broken sill was down in the mud, was it?

A. Yes, sir, both ends of it was down in the mud.

[93—33]

Q. That was the mudsill, wasn't it?

A. No, it was the joist of the building where the whole building rested on.

Q. And when did you notice that break?

A. I noticed that break when I went in there to take measurements for that tank.

Q. How far was it from the mudsill immediately under the counter-weight or elevator weight,—(illustrating). Say this is the mudsill, the bottom of this blackboard, how far was it from that counter-weight up on this upright shaft that the counter-weight run in to the floor above?

A. When, when I got hurt or before?

Q. At the time you got hurt.

A. That was about four feet.

Q. About four feet? A. About four feet.

Q. When you started to go through,—when you came in there you started to go through under the counter-weights, did you?

A. I was right on my knees when I was lighting

(Testimony of Louis Godo.)

the match to see if there was anything wrong.

Q. You lit the match before you started through there, did you not? A. Yes.

Q. Did you have any other light with you at all?

A. I had the candle.

Q. Nothing but the candle?

A. Nothing but the candle.

Q. And have you observed elevators in your experience and [94—34] in your work?

A. Yes, sir.

Q. And counter-weights? A. Yes, sir.

Q. The track or uprights that the counter-weights work on were practically clear down to the mudsill, were they not? A. Yes, sir, they always was.

Q. And there was nothing to stop the,—

A. No.

Q. (Continuing.) Counter-weight coming down if the cable was long enough to let it come, was there?

A. There was not.

Q. The only change that was made, that you know anything about, was the lengthening of the cable?

A. The lengthening of the cable.

Q. You knew that the counter-weight broke?

A. I was told they fixed the cable.

Q. You knew the cable broke?

A. I knew the cable broke; yes.

Q. And you say before it only came to the floor?

A. Within six or seven inches of the floor.

Q. Above? A. Above; yes, sir.

Q. Have you ever observed an elevator when it is being operated that sometimes they don't stop it at

(Testimony of Louis Godo.)

the proper place and it goes a little above the floor or a little below, and it will kind of bounce up and down?

A. The elevator cannot go any farther when it gets to the top floor.

Q. It could not go any farther? [95—35]

A. No.

Q. How many times did you see the elevator operated?

A. I seen that one hundred times a day, sometimes.

Q. How many times did you see the cable that it is operated on? A. Operating?

Q. Yes.

A. Well, I could see that most any time when I went under the building there before.

Q. You could not see that unless you were under the building?

A. No, I could not see them under the building. I could see them before they were enclosed.

Q. You could see them before they were enclosed?

A. Yes.

Q. How many times did you see them?

A. I could see them when they worked the elevator when I was under there.

Q. Do you know whether the elevator was clear up or not? A. When?

Q. When the counter-weight was down?

A. I could see them go through there.

Q. You would see the elevator going up and the counter-weight coming down? A. Yes.

(Testimony of Louis Godo.)

Q. You did not know what the position of the elevator was?

A. They could not go down any further than to the floor when the elevator was up to the top.

Q. Did you ever test it or use it to see whether they could or not?

A. I seen people go up and seen them take loads to the top [96—36] floor, and that is as far as they went, and the counter-weights only go to six inches of the floor.

Q. You do not know whether they could go six inches above that or not?

A. They could not unless the cable is broke.

Q. They could not go any further? A. No.

Q. You swear positively at this time that counter-weight did not come down to the floor?

A. Not at that time when I closed it in.

Q. When you closed it in?

A. Closed it in over the counter-weight.

Q. When was that? A. 1906.

Q. Now, did you ever observe that counter-weight after 1906, after you enclosed it?

A. No, not until I got hurt.

Q. You did not ever see it until you got hurt?

A. No, sir.

Q. Isn't it a fact those elevators have to be frequently repaired?

A. Well, frequently repair the elevator, but,—(interrupted).

Q. Isn't that the fact with reference to the cables?

(Testimony of Louis Godo.)

Mr. TEATS.—We object to him interrupting the witness.

A. But that cable has never been fixed before.

Q. How do you know—you were not there from 1906 to 1910?

A. If it was fixed, it was never fixed so that it come down below the floor; of course, that shows because when the weight struck it broke the sill when it went down.

Q. How do you know it was not fixed? You did not see it [97—37] and never examined the counter-weight? A. It never come below the floor.

Q. How do you know that?

A. I seen that before I was hurt.

Q. You seen that in 1906?

A. I seen it after too, yes, 1911.

Q. You saw it in 1911? A. Yes.

Q. A minute ago you said you had not seen the counter-weight again after you boxed it in?

A. I seen it when I was putting in that foundation for the tank,—

Q. Putting in the foundation?

A. I seen it did not come down below then.

Q. How many times did you look to see?

A. I was sitting there about half an hour waiting for the boys to dip the water out of the foundation so that we could go in and put in our forms.

Q. Where were you sitting?

A. Sitting on the box that goes over back of the elevator.

Q. It was a kind of trough? A. Yes.

(Testimony of Louis Godo.)

Q. Where did that trough run to?

A. That trough run out beyond the elevator as you see it indicated on the picture?

(Referring to Exhibit "A," the plat.)

Q. It did not run under the counter-weight, did it?

A. Yes, sir.

Q. Here (indicating on plat)? A. Yes, sir.

[98—38]

Q. Are you positive of it? A. Yes, I am.

Q. Wouldn't the counter-weights smash it?

A. They did not come through there, so that they could not smash it.

Q. They did not come through there?

A. No, sir.

Q. So that they could not smash it?

A. So that they could not smash it.

Q. And it was right down under that weight?

A. It was through that hole right under that weight.

Q. You sat by the ringer foundation and watched that thing, did you?

A. No, I was sitting on top of that box.

Q. Right there near the counter-weights?

A. Well, I sat probably in the middle of the box there.

Q. And how many trips did you see it make?

A. Which?

Q. The counter-weight.

A. The counter-weight; I never seen it make any trips then; it did not come down then at all.

Q. Do you know whether the elevator was being

(Testimony of Louis Godo.)

operated, or not?

A. Yes, the elevator was being operated. I could hear that.

Q. How many trips did it make?

A. It must have made half a dozen trips.

Q. You do not know whether it went to the first, second or third floor or how high up, do you?

A. They were taking some wool up.

Q. How do you know? [99—39]

A. I seen it through the opening; they were dragging wool into the elevator.

Q. It was light enough so that you could see outside and see what was going on under the wharf?

A. I could see what was going on outside from the inside.

Q. You sat there for half an hour, you say?

A. I think one-half an hour, I should judge.

Q. At the time you were putting in the ringer foundation? A. Yes, sir.

Q. What were you doing sitting here?

A. Waiting for the fellows to dip the water out.

Q. Were you talking to anybody?

A. Talking to my foreman and them fellows, the foreman and the other man.

Q. Where was he? A. Who?

Q. Your partner.

A. He was sitting alongside of me.

Q. Which side of you was he?

A. Of that I could not swear.

Q. Was it toward the counter-weight or the other way?

(Testimony of Louis Godo.)

A. I think he was sitting next to the foundation.

Q. That would be next to the counter-weight, would it?

A. No, that would be away from the counter-weights.

Q. You sat there talking to him? A. Yes.

Q. Which way were you facing?

A. I was facing lots of ways—facing out, looking out under the wharf at that and looking at the men that were dipping the water, as a man is when he is sitting. [100—40]

Q. As a matter of fact, you were not paying any attention to the counter-weight?

A. I could not say I did not pay any attention, but—

Q. You did not notice the counter-weight while you were sitting there, did you?

A. No, I did not—

Q. You did not glance up—

Mr. TEATS.—We object to counsel interrupting the witness.

The WITNESS.—If it had come down it would have certainly smashed that box and I would have noticed it, but it did not come down there.

Q. As a matter of fact, you did not notice whether it came beneath the floor at all or not, did you?

A. No, I do not know.

Q. You do not know at that time from your observation whether it came below the floor at that time?

A. It did not come below the floor at that time.

(Testimony of Louis Godo.)

Q. You are positive of that?

A. I am positive of that.

Q. You know it could not have come below the floor at that time?

A. Not on that length cable they had.

Q. If it had been on a cable that came below the floor you would have discovered it, would you?

A. Yes, sir, I would.

Q. You could not help seeing it while you were sitting there? A. Yes.

Q. And if it develops in this trial from the records of the company that the change was made and the cable was lengthened out two or three months before you put the [101—41] ringer foundation in there, then you are mistaken?

A. That was no such a thing.

Q. You are positive of that. A. Yes, sir, I am.

Q. If the change was made before you put the ringer foundation in there, then when you were sitting there at that point you could have seen it?

A. Yes, sir.

Q. And you would have known about it?

A. Yes, sir.

Q. And if you had exercised your faculties you would have known it was there?

A. I could have because it would have smashed that box, the counter-weight coming down within six inches of the floor, of the ground.

Q. Now, I want to call your attention to Defendant's Identification 1, and ask you to tell what that picture is.

(Testimony of Louis Godo.)

A. That was not there when I was there.

Q. Have you ever been there since the tank was put in? A. No, sir.

Q. Wasn't you over there the other day?

A. No, sir.

Q. With the exception of the tank. Leaving the tank out of the picture, isn't that a photograph of the packing-house at the time you went there to make the measurements?

A. That is something that was not there when I was there.

Q. Well, from there down is all I care about, where the stuff runs out into the tank.

A. I never saw the stuff—

Q. Leaving the tank out. From the tank on down this way does [102—42] the picture—

A. This is the way it was at the time I was there.

Q. And you were putting the tank in that wharf in the position this tank is in, weren't you? A. Yes.

Q. And the studding that you were to measure is the studding that this tank rests on there, wasn't it?

A. I do not know a thing about that, because I did not get to see.

Q. You were told to get the measurement of the studding next to that place.

A. I was told to get the measurements from the building to the next cap.

Q. The next cap? A. The next cap.

Whereupon Identification 1 is offered in evidence by the defendant, received in evidence by the Court

(Testimony of Louis Godo.)

without objection, and marked as Defendant's Exhibit 1.

Q. I show you Defendant's Identification 2 and ask you if that shows the side of the glue-house showing the elevator-well and the space left vacant between the wharf and the building.

A. That is the place where I was.

Q. Does that show the correct position?

A. That is the correct position where I went in under.

Q. Where did you crawl under?

A. Right here on this corner.

Q. Mark that with an X there. And this open door here shows the elevator, does it—that shows the elevator? [103—43]

A. That shows the elevator on top of the wharf.

Mr. EVANS.—We offer this in evidence.

The COURT.—It will be admitted.

Thereupon said photograph, Defendant's Identification 2, is received in evidence and marked Defendant's Exhibit 2.

Q. Now, Mr. Godo, we will say that this is the side of the Judge's desk, and this ruler is the track or uprights in which the counter-weight runs.

A. Yes, sir.

Q. Now, before you get to that, right at the side of it is an opening, is there not?

A. There was not at the time I was there.

Q. There was not any opening there? A. No.

Q. And on the other side right here there is an opening, is there not? A. No, sir.

(Testimony of Louis Godo.)

Q. And then right in front of you—(Interrupted.)

A. Which side are you talking about?

Q. The right. A. Only to the south.

Q. To the right of the counter-weights you could go in there.

A. Well, when I was there was boards stuck up and down there and dirt piled in it, old boards to hold back the dirt.

Q. Now, I will ask you if right in front of you you could not go right straight ahead, and right around the counter-weights and have the whole area underneath that packing-house in which to go around to the place you thought you could [104—44] measure through? A. Which?

Q. Right on beyond where the counter-weights were, the whole area under there was open, wasn't it?

A. Yes, sir; that is 15 feet from the counter-weight; there was a place 15 feet from the counter-weight that was not open.

Q. I will show you Defendant's Identification 3 and call your attention to a gentleman in the picture and the opening through which you look to see him. Was that opening there when you were hurt, right where Alstrum is sitting?

A. I cannot see where that is.

Q. I will call your attention to the fact that here is the opening of the counter-weight between these two uprights; was that opening there?

A. That is under the new building.

Q. Now, right straight from where you crawled in, just after crawling in, assuming you crawled in at

(Testimony of Louis Godo.)

the place you said you did right here at this X, the counter-weight would be back of the elevator here, wouldn't it?

A. Right back that way (indicating).

Q. Right back over here?

A. No, you could not see that. This is the elevator on the north side and the counter-weight is on the south side of the elevator.

Q. That is what I am getting at, and it is about in a parallel line with this side of the elevator.

A. No.

Q. How far back is it? [105—45]

A. Well, it comes just down to the corner of the elevator.

Q. It comes down at the corner of the elevator?

A. Yes.

Q. Now, when you got there you started to go through right here at the point under the counter-weights.

A. Well, I tried to get through there first and then I come around here (indicating).

Q. Wasn't it open so that you could go right straight ahead?

A. It was open, but, my God! the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can.

Q. It was dirty under there—you know under that packing-house it was just tide-flats and soft mud?

A. Certainly.

Q. And you could have gone straight ahead and

(Testimony of Louis Godo.)

gone around the elevator shaft entirely, couldn't you?

A. I could have gone out that way by going 20 feet more—15 feet more.

Q. Looking at your plat here, you stated that you came in right there where the letter H is.

A. Yes, sir.

Q. You came down here to where the counter-weights are and started under? A. Yes.

Q. You could have come right straight ahead and climbed over that studding, gone right straight and around to your point of labor, couldn't you, that you intended to go to? A. I could do it.

Q. You could have done that, that was open? [106—46] A. That was open.

Q. And you could see it?

A. Yes, I could see it.

Q. You knew there was no counter-weights or anything else over there? A. I did.

Q. Now, nobody told you to go under the counter-weights, did they?

A. They did not. They told me to go under the wharf.

Q. They told you to go under the wharf?

A. Yes.

Q. You do not know of any work being done under that packing-house over on the side beyond the elevator shaft, along the wall adjacent to the new tank, do you, prior to that time? A. No, sir.

Q. The only work that had been done under there at all was to put in this big vat over to the other side

(Testimony of Louis Godo.)

of the packing-house, wasn't it, and this ringer foundation? A. Yes, sir.

Q. That was the only thing that would occasion any men to go under there at all?

A. Have to go under there to draw the water out of the washer?

Q. You had never been under there at all yourself? A. Never under there.

Q. Did you know of anybody that had been over there? A. I did not.

Q. Did you know of any occasion that anybody would have to go in there?

A. Not to my knowledge. [107—47]

Q. Did you know whether or not you could go under the wharf there at all?

A. I knew I could go through there by cutting a hole in the plank.

Q. Did you have anything with you to cut that away? A. Yes.

Q. What did you have?

A. I had a hammer and chisel.

Q. You took a hammer and chisel and a pole twenty feet long? A. Yes.

Q. To go down there to get under the wharf, that is what you were going to try to do? A. What?

Q. You could have taken up the plank on the wharf and made your measurements without going under the building at all?

A. I could, but Mr. Cornils would not let me.

Q. Cornils would not let you? A. No.

Q. What did he say?

(Testimony of Louis Godo.)

A. He says, "If Tom sees you pulling up the wharf, he will give you hell."

Q. That is Tom, Mr. Carstens? A. Yes.

Q. You want the jury to understand that Mr. Cornils, the master mechanic, told you that if Carstens caught you taking up the planking to make the measurement for that tank he would give you hell—is that it? A. That is what he told me.

Q. You were going to cut the wharf out to set the tank in [108—48] in there, weren't you?

A. He told me he would have the laborers to do that work.

Q. He was going to have it done?

A. He was going to have the laborers do that work.

Q. What you were to do was to get the measurement from the building, from the foundation, over to this cap? A. Over to that cap; yes.

Q. You say he told you to go under the wharf?

A. Yes.

Q. Why didn't you go under the wharf?

A. I could not go under the wharf.

Q. Did you tell anybody you could not go under the wharf? A. I did not.

Q. You did not? A. No.

Q. You went this same way because that suited your convenience to do that work that way, did you?

A. I had to do it, because I always had to do what I was told.

Q. And if a man told you to butt your head against a wall you would not make any remonstrance—you would go and do it?

(Testimony of Louis Godo.)

Mr. TEATS.—I object to that.

Q. If he told you to do an impossible task you would go and try to do it without any question, would you?

Mr. TEATS.—I object to that as immaterial.

The COURT.—Sustained as argumentative.

Q. You knew you could not get under the wharf at all, didn't you?

A. Not at the place I tried to first, but I knew I could get a measurement by cutting a hole in the building [109—49] over on that side.

Q. Over on what side?

A. On the north side of the building.

Q. Was that the only place you could cut a hole through? A. By going under the wharf.

Q. It was the only place under the whole building where you could do that?

A. Well, I had to go to the place where I could make the measurement, that is the certain place where that plank was situated.

Q. You had never been there?

A. I ain't, but I know I could get through.

Q. But you did not know whether you could get through there or not?

A. I know I could not get through there unless I cut a hole in the wharf.

Q. You could cut a hole in the wharf before you got through there, couldn't you?

A. No, I could not get my measurements until I got to the certain place where the tank was situated.

Q. Why could not you have cut the hole where you

(Testimony of Louis Godo.)

tried to get under there?

A. Because I had to get my measurement.

Q. You could have gone under the wharf and got the measurement there, couldn't you?

A. I could not get under the wharf unless I could cut a hole out of the cap, so that I could crawl in.

Q. If you had cut your hole down here this side of the elevator shaft, you could have gone through there and gotten under the wharf through there?

[110—50] A. There was no place there.

Q. The wharf was higher than the other floor, wasn't it?

A. The cap was just about six inches from the dirt, from the muck, and I could not crawl under there.

Q. The only direction you had was to go under the wharf. A. To go under the wharf.

Q. And make that measurement.

A. And make that measurement.

Q. You are positive that Pete told you you could not take up the plank on the outside? A. Yes, sir.

Q. Do you remember anything that was said to you immediately after you were hurt?

A. Yes, I remember, not immediately, but on the way to the hospital.

Q. On the way to the hospital? A. Yes.

Q. Do you remember anything that was said right there at the time?

A. Not as I remember. I know I cannot recall anything that was said there, only Mr. Cornils come and wanted me to sign a paper while they were tak-

(Testimony of Louis Godo.)

ing me into the ambulance and taking me to the hospital.

Q. You were not unconscious at that time?

A. No, I was not then.

Q. Didn't he say to you, "Why didn't you obey my instructions?"

A. No; he did not say anything of the kind.

Q. Did not make any such remark as that?

A. No, sir.

Q. Who was there? [111—51]

A. I do not know who was there when they took me out.

Q. Who was there when he told you to give him the release? A. There was not anybody with me.

Q. Just you and Pete? A. Me and Pete.

Q. Now, Mr. Godo, I show you Defendant's Identification 4, which purports to be a picture of the counter-weight clear down, and ask you if that represents the situation there, with the exception that the counter-weight is down?

A. Them openings were not there at the time I got hurt.

Q. This opening here marked A and this opening here marked B, were they there at that time?

A. No, they were not there.

Q. I refer to these here.

A. Them openings there were not there at the time.

Q. There were not any openings along the side of the counter-weight? A. No, only along the sill.

Q. Up to the top along the sill?

A. Up to the top.

(Testimony of Louis Godo.)

Q. There was not any perpendicular opening here as shown in this picture? A. No, not that I seen.

Q. Was there anything there at all?

A. I could not say. Of course I did not get so far over; I did not get to see it.

Q. When you went under there this counter-weight was about how far from the side of the building?

A. That I could not say. That was about six inches from the west plank of the elevator shaft there. [112—52]

Q. Approximately how far out from the wall there? A. It was about eight feet.

Q. About eight feet from where you crawled under to where the counter-weight was? A. Yes.

Q. It was daylight when you went under there, wasn't it? A. At that time it was light.

Q. There was a hole the light came through?

A. Yes, there was a hole the light came through.

Q. And you could see the general surroundings?

A. Yes.

Q. You could see that was the place where the counter-weight run? A. Yes.

Q. You could see the grooves on the plank, on the side of the counter-weight shaft?

A. I could not see the grooves, but I could see the lead taps.

Q. You knew that was the counter-weight track?

A. Yes.

Q. You could see generally the place right ahead of you? A. I could.

(Testimony of Louis Godo.)

Q. You knew it was all open under there with the exception of that space, didn't you? A. Yes.

Mr. EVANS.—I offer in evidence Number 3.

Mr. TEATS.—We object to that, the conditions were not the same when the picture was taken as they were at the time of the accident.

The COURT.—The objection will be overruled. The jury will understand the differences he pointed out. [113—53]

Thereupon said photograph is received in evidence by the Court and marked as Defendant's Exhibit No. 3.

Q. The opening where the man is shown was, I believe you testified, in Number 3? A. Yes.

Mr. EVANS.—I will offer Number 4 too. He said the only difference is he didn't think these openings were on the side of the counter-weight.

The COURT.—It will be admitted subject to the exception regarding the condition.

Thereupon said photograph is marked as Defendant's Exhibit Number 4.

Q. The condition as to the light had not been changed between the time you sat on the box and watched the proceeding there in April, and the time you got hurt, so far as the light was concerned?

A. Not to my knowledge,—well—

Q. It was just as open as it had been before?

A. No, it was not. There the addition, the new building built on there, and there was a flooring laid that made it darker all over.

Q. That building was there at the time the founda-

(Testimony of Louis Godo.)

tion was put in, wasn't it? A. No, sir.

Q. In the course of construction?

A. They just started to cut the hole in the wharf for the posts.

Q. That new building was built on the outside of the other building, wasn't it? [114—54]

A. Yes.

Q. And there was a wharf out from that old building at the time? A. Yes.

Q. So that so far as this opening and where you crawled in on the day you got hurt, that was all just in the same condition?

A. That was all in the same condition.

Q. And the light from that point came just the same at the time you got hurt as it had before?

A. Yes.

Q. It would be just as light as the place you sat as it was before? A. Yes.

Q. Where did you say this counter-weight hit you?

A. It struck me on my shoulder.

Q. Which shoulder?

A. Right across the back.

Q. Right across the shoulders? A. Yes.

Q. Just indicate on me where it struck you.

A. Right there (illustrating on counsel).

Q. Above your shoulder blades?

A. Right there.

Q. It hit you above your shoulder blades?

A. Yes.

Q. How did you hurt your foot?

(Testimony of Louis Godo.)

A. The foot was caught on the plank I was standing on.

Q. The foot got caught on the plank?

A. I was forced over. I do not know how I got hurt, but I [115—55] was on that plank.

Q. You were held there?

A. It crushed me with the weight.

Q. It held you there until they raised it up?

A. Yes, it held me there until they raised it up.

Redirect Examination.

(By Mr. TEATS.)

Q. Whereabouts is the wharf—can you tell by looking at Number 2? What do we understand by the wharf?

A. The wharf is off here (indicating).

Q. Is this the wharf here, this plank?

A. Yes.

Mr. EVANS.—The flooring where the figure 2 is written.

Mr. TEATS.—Q. And where you went under is at this first opening here from the elevator?

A. Right there at the corner.

Q. This one here? A. Yes.

Q. Now, when you got down in there, what did you find? A. Found some dirt and mud and shit.

Q. Filth and manure?

A. Filth, manure and everything.

Q. How deep was it?

A. I went down one foot, pretty near.

Mr. EVANS.—I move to strike that out as not redirect.

(Testimony of Louis Godo.)

The COURT.—Why are you going over this again, Mr. Teats?

Mr. TEATS.—To show the condition. His main stress is why didn't he go through some other way.

The COURT.—Objection overruled. [116—56]

Mr. EVANS.—Exception.

The COURT.—Exception allowed.

Mr. TEATS.—Q. The question was asked you why didn't you go through here where you see Alstrum. Is Alstrum in the courthouse?

A. No, sir.

Q. Why didn't you go through there?

A. I didn't like to crawl on my knees in that dirt and mud and filth.

Q. Over there beyond this space?

A. Over there beyond this space.

Q. Look at Number 4. Do you recognize the weight there? A. Yes, sir.

Q. When did you ever see that down in that position? A. Never did.

Q. Never did see it? A. No, sir.

Q. Now, you were speaking about a broken plank. Can you explain it more fully to the jury by number 3?

A. That comes across here (indicating), comes across there, over there by the wharf. This picture shows under the floor; it shows the joists. Right on top there it was broke.

Q. Which was broke?

A. The joist forming this top.

Q. When did you first know that was broken?

(Testimony of Louis Godo.)

A. When I tried to get through here.

Mr. TEATS.—The space we are looking at is the second space in the photograph.

Q. And that space we will mark with a round mark, circular [117—57] mark.

A. Yes, I think that is about where it is.

Q. About how wide is that space?

A. That space there,—

Q. Where the counter-weight came down?

A. That is a little over two feet.

Q. Can you explain by Number 4 where that broken plank was? A. No, it don't show there.

Q. I know the broken plank don't show, but can you show the space where the broken plank was?

A. It was right on top there, top of the joist.

Q. What is this plank here that we see?

A. Where the joist lays on.

Q. That is one of the joists that go through there?

A. Yes.

Q. Was this plank like a trough, laying flat?

A. No, it was standing on the edge, broke down on the edge.

Q. Broke down on the edge?

A. It fell right out from the studding.

Q. Now, he would have you say in his examination that there were some guides up and down?

A. Yes, sir.

Q. In which at the time you were hurt the counter-weights ran. Did they run down in here?

A. Yes, sir, they run down in here.

Q. Could you see them? Did you know the coun-

(Testimony of Louis Godo.)

ter-weights ran down?

A. I did not know the counter-weights run down, but I seen the guides.

Q. Were the guides there too? [118—58]

A. Yes, sir.

Q. Was there anything there to indicate that the counter-weights came down?

A. Not that I could see.

Recross-examination.

(By Mr. EVANS.)

Q. What did you think those guides were there for? A. What is that?

Q. What are those guides for?

A. Down there?

Q. Yes.

A. I don't know what they were down there for.

Q. Well, they were just the same as they were above, where the counter-weight run, just a continuation? A. They did at the time I got hurt?

Q. They were there before you were hurt?

A. They were there.

Q. Never been any change in them, so far as you could see?

A. No, not as far as I can recollect.

Q. Just the same clear up and down, they ran clear down in the mud? A. Yes.

Q. Now, what do you suppose they put those guides there for?

A. That is more than I can tell you. Have them there to run the counter-weights on.

Q. You say that there was a beam or plank

(Testimony of Louis Godo.)

broken? A. Yes.

Q. Where was that?

A. That was right up over, from this girder over to the [119—59] outside girder.

Q. From this plank or beam?

A. Or joist; yes.

Q. Now, how far down did it go?

A. It go right down to the mud, one end of it.

Q. One end of it came right down in the mud here?

A. Yes.

Q. And you tried to crawl over that?

A. No, I was trying to crawl under it, through here (indicating).

Q. You were trying to crawl under it?

A. Yes.

Q. It was not in this space, was it (indicating)?

A. No, the break was over close by the girder.

Q. How did it hinder you from going through there?

A. It did not hinder me from going through; I was going through there.

Q. What has that got to do with the story?

A. I guess when that cable broke that counter-weight broke that joist.

Q. Oh, it did? A. Yes.

Q. When the cable broke it broke that joist?

A. Yes, sir, that joist.

Q. And they never had to fix it?

A. No, never to my knowledge.

Q. Were you there when they broke it? A. No.

Q. This joist is out to the side of the guides of the

(Testimony of Louis Godo.)

counter-weight track, isn't it? [120—60]

A. I do not know whether it is or not, but it is under the whole of the building, and the guides were naturally nailed to the studdings.

Q. You can see it right there in the picture, can't you? A. I cannot see that exactly.

Q. Let me call your attention to that line right up there, and ask you if that don't look like a picture of the guide.

A. Well, it might be, but I cannot say for sure.

Q. Now, what broke there was the—well, we will say this is the counter-weight, the cable being fastened into the counter-weight at the top, and the cable broke off here by the counter-weight (illustrating)? A. Yes.

Q. And let it drop down? A. Yes.

Q. Explain to me how it broke that joist.

A. Of course the counter-weight got out over the joist.

Q. The counter-weight got out over the joist?

A. Yes.

Q. Clear out here over the joist (indicating)?

A. Yes.

Q. How could that get over the joist if it run in the track?

A. The counter-weight was bigger than the roads, and them roads was right up against the joists.

Q. It ran up above there all right?

A. It ran up above there all right, there was nothing to hinder it above.

Q. How big was this joist?

(Testimony of Louis Godo.)

A. I do not know whether it was 12 by 12, or 13 by 12. [121—61]

Q. Were you there when the accident happened?

A. Which?

Q. When the joists got broken? A. No, sir.

Q. When had you ever seen it?

A. Seen it when I went under there.

Q. Did you ever hear of it before? A. No.

Q. How do you know the counter-weight broke it?

A. Because there was no other weight to break it.

Q. That is your conclusion? A. Yes.

Q. From what you saw there, that sometime prior to that the counter-weight fell and broke it?

A. I do not know about that.

Q. You do not know anything about what broke it?

A. There was nothing else to break it but the counter-weight.

Q. You do not know what else broke it, do you?

A. Not for certain. I did not see it.

Q. You knew that the counter-weight had fallen once—you knew the cable broke once and let the counter-weight down?

A. I knew the cable broke, but I did not know the counter-weight come down there or not when it was fixed.

Q. You knew if the counter-weight broke it would come down, if the cable broke? A. I expect so.

Q. You knew it had broken?

A. I expected it had; yes.

Q. You knew it would be dangerous to be underneath if it broke again, didn't you? [122—62]

(Testimony of Louis Godo.)

A. I knew it would be dangerous; yes.

Q. You knew at the time you went under there, or started to go through there, you knew the counter-weight had broken and come down?

A. I knew the cable was fixed, yes.

Q. You knew the cable had broken and the counter-weight come down, did you not? A. Yes.

Q. And yet you went through there or tried to?

A. How?

Q. Yet you tried to go through?

A. It was fixed when we tried to go through there.

Q. You knew there had been some change made there?

A. I knew there had been a change made or they had fixed it.

Q. You knew it had been fixed. Now, what would be the simplest way to fix it?

A. Raise the weight up to its place again where it was, or else tie on to your weight where it was, and then board up the holes so that nobody could come up into dangers.

Q. Wind off the drum one wrap of the cable, and connect the cable with the weights and then wind it on, if that could be done, that is the way to do it, isn't it? A. That is the way to do it.

Q. Yes.

A. But if you done that you ought to cover it so that nobody could get under the weight.

Q. But that is a very frequent method of repairing a break of that kind, isn't it? A. Which.

Q. That is the natural way to repair that, isn't it?

(Testimony of Louis Godo.)

[123—63] A. Yes.

Q. Sir? A. Yes.

Redirect Examination.

(By Mr. TEATS.)

Q. Now, at the time you lighted your candle, were you crawling through there or what were you doing?

A. No, sir, I was standing still.

Q. What for? A. For to light the candle.

Q. What else?

A. I did not get to light the candle. I got the match lit, but I did not get to light the candle until it struck me.

Q. Before it struck you? A. Yes.

Q. Why did you want to light the candle?

A. So that I could see what ails that timber that was broken, or if there was any danger.

Q. Whereabouts?

A. Right there, where there was danger around me.

Q. So that you were not crawling through at this time when you got struck? A. No.

Q. You were lighting the candle to look into the dark to see what was the matter?

A. Yes, to see what was the matter.

Q. And why this timber was broken? A. Yes.

(Thereupon the jury was admonished and excused until 10 o'clock the following morning.) [124—64]

(Testimony of Louis Godo.)

November 26th, 1912, 10 A. M.

The call of the jury being waived, and the jury being present, the trial of this cause was continued as follows:

LOUIS GODO, being recalled, continues his testimony as follows:

Redirect Examination.

(By Mr. TEATS.)

Q. Do you know about where you were located when Pete Cornils told you to go under the wharf and make the measurements?

A. I was standing about ten feet from the corner of the new building, on the wharf.

Q. Which way?

A. To the north of the new building.

Q. Over this way? A. Yes, sir.

Q. Somewhere in this locality? (Indicating on Ex. "A.") A. Yes.

Q. Mark that X there, with a ring around it. Were there men working on the new building at that time?

A. Yes, sir.

Q. Who were they?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.

A. A man by the name of Hansen and another fellow by the name of Lee West.

Recross-examination.

(By Mr. EVANS.)

Q. How far was it from the tide-flats to the wharf?

[125—65] A. Sir?

(Testimony of Louis Godo.)

Q. How far was the wharf from the tide-flats?

A. I should judge about six or eight inches; the cap is part of the tide-flats, part of the mud.

Q. I mean the platform or wharf.

A. The platform at that place would be about two feet.

Q. Two feet? A. A little over two feet.

Q. Above the flats? A. Above the muck.

(Witness excused.) [126—66]

**[Testimony of J. E. Belcher, for Plaintiff
(Recalled).]**

J. E. BELCHER, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Do you know from your own memory or from information that you have gathered when the ringer foundation was built? A. Yes, sir.

Q. From what did you gather your information?

A. From the time-book, showing what the boys were doing—I mean Godo and Olson—and from the bills we paid for material that was used in the construction.

Q. Do the two tally?

A. The forms were built just prior to the time the material was bought to build the concrete with.

Q. When was that?

A. On April 26th, 1911, we paid the Smith Cement Company— (Witness refers to papers.)

Q. That is not what I want. I want what was bought, not paid. Can you tell that from your mem-

(Testimony of J. E. Belcher.)

ory? A. No, I cannot.

Q. You have no idea, only from what the records show, and that *and that* is not an original record?

A. This is an original record; yes.

Q. How do you mean it is an original record?

A. It is an original time-book.

Q. Do you know who made it? A. I do.

Q. Did you make it? A. No, sir.

Q. I do not care for information from that source. I did not [127—67] know but what you had some payments—

The COURT.—Ask about something you do care about then.

Mr. TEATS.—That is what I am asking right now, when it was made; that is what I care about. I do not care about any information gathered that is second-handed stuff, if the Court please.

The WITNESS.—That is all I can give you at any event.

Q. So that you do not know when that was built?

A. I do not; no.

Mr. EVANS.—The time-keeper who kept this record, Mr. Lungren, is outside, and if Mr. Teats cares for the information he can get it from him.

(Witness excused.) [128—68]

[Testimony of Nels Olson, for Plaintiff.]

NELS OLSON, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Where do you live? A. 4138 South J.

(Testimony of Nels Olson.)

Q. What is your business? A. Carpenter.

Q. How long have you been working at the carpenter trade? A. About 11 years.

Q. Were you working for the Carstens Packing Company in May, 1911? A. Yes, sir.

Q. How? A. Yes, sir.

Q. Who were you working with during May 27th, 1910? A. Louis Godo.

Q. The plaintiff in this case? A. Yes, sir.

Q. Look at this Identification "A." I will ask you whether you recognize the ground floor and tide-flat situation there by that map.

A. It is the mud-flat, I guess.

Q. Did you assist in making the form for the ringer platform? A. Yes, sir.

Q. Who did you assist in it? A. Louis Godo.

Q. Whereabouts did you get under the building?

A. From the front of the old building.

Q. How? [129—69]

A. From the front of the old building.

Q. What were the conditions under there?

A. Oh, it is nothing but mud and water and filth.

Q. How far below the joists is the flats around south of the elevator-well? A. I do not hear.

Q. How far below the building was the flats south of the elevator-well?

A. I should judge about four or five—about five feet underneath there. I would not say for sure.

Q. Do you remember when you went in there to fix the form—do you remember when that was?

A. It was some time in April, I think. I cannot say the exact date.

(Testimony of Nels Olson.)

Q. 1911—April, 1911? A. Yes.

Q. Were there any other men there at that time?

A. They had a few helpers down in there.

Q. What were they doing?

A. They were cleaning out the mud and filth.

Q. From where?

A. From the foundation; fixing the foundation.

Q. From the foundation, that is where you were going to put the foundation?

A. Yes, the ringer, making a hole, digging a hole there for the ringer.

Q. And how do they do that?

Mr. EVANS.—I do not think that is material, and object to it as immaterial.

The COURT.—Objection overruled. [130—70]

Mr. EVANS.—Exception.

A. Why, they had planks down to keep the dirt from getting back into the hole.

Q. They were doing what?

A. Well, they bailed out all the slush into the box and it went off through the building somewhere. I could not say where.

Q. Which way did the box go?

A. It went towards the northwest corner of the glue-house.

Q. Along about where you see these two lines, along in that direction?

Mr. EVANS.—We object to that as leading.

The COURT.—Objection sustained.

A. The northwest corner of the building.

Q. Could you tell about which way they were—

(Testimony of Nels Olson.)

towards the northwest corner of the building?

A. Yes.

Q. That is over in this direction? A. Yes.

Q. Do you remember when you were there waiting for the water and filth to be taken out of this hole preparatory to putting in your forms, or the forms for the cement foundation, what you and Godo did?

A. We were sitting on the end of that box there when they were working there.

Q. Which end? A. The upper end of it.

Q. What do you mean by the upper end?

A. At the end where they poured their slush in it.

Q. That is the southeast end? [131—71]

A. Yes.

Q. How were you sitting as to Godo?

A. I cannot remember how we were sitting. I know we were sitting on the side of the box there.

Q. Were you ever under there before?

A. No, sir.

Q. Now, at that time I will ask you whether or not the new addition was being built.

A. No, it was not built at the time we fixed the ringer.

Q. What were you doing on the 27th day of May, the day of the accident to Mr. Godo?

A. We were working on some 3 by 12's. I think they werè for piling, for a dam out there.

Q. And where were you working?

A. North of the new part of the glue-house.

Q. North of what?

(Testimony of Nels Olson.)

A. The new part of the glue-house.

Q. Did you have occasion to go under the building that day, under the new part?

A. Not until the time Louis got hurt.

Q. At the time Louis got hurt were you working with him? A. I was working with him.

Q. How did you happen to go under there with him?

A. He had a pole in his hand and I asked him when he could take,—

Mr. EVANS.—We object to that.

Mr. TEATS.—It is part of the *res gestae*.

The COURT.—The objection is sustained about the talk. Tell what they did.

Q. Just tell what you did and what he did and what you were [132—72] going to do. I think it is part of the *res gestae*, anyhow, if the Court please.

A. We were working on them piling, and it was about, I could not say whether it was four o'clock or not. It was in the afternoon and Pete came along and called Louis off. They were going to put in the tank, and they went over in the direction of the stair-way where the tank sets in there, and I went in the blacksmith-shop or carpenter-shop with our tools, and when I came back again Pete Cornils had gone, and I asked Louis, I say,—

Mr. EVANS.—We object to that.

The COURT.—The objection sustained in regard to what the plaintiff told him.

Mr. TEATS.—Q. Just tell what you did.

A. I came back again and Louis had a pole in his

(Testimony of Nels Olson.)

hand, and I said, "Where are you going"—(interrupted).

Mr. EVANS.—I object to that.

Mr. TEATS.—I think that is part of the *res gestae*.

The COURT.—The objection is sustained. You are only asked to tell what you did. The Court has asked you a couple of times not to tell what Godo told you.

A. We went underneath the building at the corner of the new part and the old part of the glue-house.

Q. Whereabouts did you go under? Look at Identification Number 2.

A. We went under right here.

Q. Where that blue mark is? A. Yes, sir.

Q. The triangle? A. Yes, sir. [133—73]

Q. Which went in first—you or Godo?

A. I cannot remember who went in first. I think Godo went in first and I followed him.

Q. Then what did you do when you got in there?

A. I think Louis lit a candle and I had my back to him, and when I turned around I seen him on his hands and knees going through the hole where the elevator-shaft or weight comes down. When I turned around I seen the weight go down on top of him. I ran out there and hollered to get hold of the elevator rope, and somebody did up above at the same time and pulled the cable and got the elevator coming down again, and when I got down underneath again Louis was sitting on the inside of the hole, and I crawled through and asked him if he was hurt very bad; "Take me out," he says, and I took him around

(Testimony of Nels Olson.)

—around the timber and brought him out.

Q. Look at Exhibit “A.” Which way did you take him out?

A. Took him around this way, around this way. It was boarded up here, and we come around there and come up through there (indicating on plat).

Q. Make a mark about the course you went.

(Witness does so.)

Q. Where was it boarded up?

A. In here, a few boards in there. I know I took him around there. I do not remember just how it was. I took him around.

A JUROR.—Where did you say the boards were?

A. Here, right along here.

Mr. TEATS.—Q. Now, when the weight came down on Mr. Godo, in what position was he? [134—

74] A. When he got underneath?

Q. Yes. When you turned around and saw the weight strike him, in what position was he, can you describe that to the jury?

A. He was sitting down just about like this. (Illustrating.)

Q. That was after the weights were taken off?

A. Yes.

Q. I mean when the weight hit him.

A. He was down on his knees crawling through the hole.

Q. While the weight was on him?

A. When the weight came down he was just squashed down like that, you know.

Q. How near to the ground was he squashed down?

(Testimony of Nels Olson.)

A. There is a timber that is broken off there where it goes underneath there, and I guess his face was right down in the mud, and the weight got on top of him.

Q. Who helped you take him out?

A. I do not know the name of the fellow. Carroll, I think his name is.

Q. Carroll? A. Yes.

Q. Did Mr. Hansen help take him out?

A. I remember he was right there when I got out from underneath the building.

Q. Now, when you went in after lifting the elevator-weight off of him, where was Louis?

A. He was in the hole.

Q. How?

A. He was underneath the glue-house.

Q. How far from the hole? [135—75]

A. Right at the hole; his feet was just about at the hole.

Q. Which way did you go to him?

A. I crawled through the hole.

Q. Why didn't you go there around some other way?

Mr. EVANS.—I object to that as immaterial.

The COURT.—The objection is sustained.

Q. Could you have reached him any other way?

Mr. EVANS.—That is objected to for the same reason.

The COURT.—The objection is overruled. It goes to the conditions.

Mr. EVANS.—Exception.

(Testimony of Nels Olson.)

A. No, I never thought about it, never come in my mind. I was excited when I seen him hurt there.

Q. Where was the elevator-weight when you went in to help him out? A. Up at the top.

Q. Top of the building?

A. Yes; the elevator was down and the weight was up.

Q. When you went in there what was the condition of the ground in west of the elevator-well?

A. Pretty muddy in there.

Q. What was it as to filth?

A. Well, it is mud and water.

Q. What else?

A. That is all I can remember of.

Q. How deep was that mud—did you get into it?

A. I do not know how deep it was. I stepped in there over my ankles.

Q. After you got him out what did you do?

Mr. EVANS.—I object to that as immaterial what he did after [136—76] he got him out.

The COURT.—You understand, just what you did in connection with the plaintiff.

The WITNESS.—After I got him out I took him over to the lumber pile and went and got some water for him.

Q. Where was the lumber pile?

A. Just about where we were fixing them planks.

Q. To the north of the new addition? A. Yes.

Q. Then what did you do? What condition was Godo in when you first found him over here under the glue-house?

(Testimony of Nels Olson.)

A. Why, he was sitting up and he was grunting and he was bleeding through the nose.

Q. What condition was he in when you took him out?

A. Well, groaning and complaining that he was hurt.

Q. Could he walk—could he crawl?

A. No, I dragged him out.

Q. Then when you got him outside the new building could he walk?

A. No, he could not walk. We helped him along.

Q. To the lumber pile? A. Yes.

Q. Then what did you do after you got him some water? A. I think I went to my work.

Q. Who was there to attend to him?

A. Oh, Pete Cornils, and Charlie Lundgren, the superintendent, and quite a few others. I cannot just think of them, who they were.

Q. How long were you at work on the form for the ringer foundation? [137—77] A. Two days.

Q. Both you and Godo? A. Yes.

Q. When you went in there whereabouts were you bound for?

A. I did not know where I was bound for.

Q. How did you work then—under whose orders did you go?

A. Well, I was working partly with Louis.

Q. Louis would take the orders and you would follow the orders from him? A. Yes, sir.

Q. Now, at the time he went in there what, if anything, did he say before he went to that hole where

(Testimony of Nels Olson.)

the counter-weights came down?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—It is part of the *res gestae*.

The COURT.—Objection sustained.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Cross-examination.

(By Mr. EVANS.)

Q. You testified there was a broken beam of plank there; that was the mudsill at the bottom down here, wasn't it? A. Yes.

Q. The broken plank was this one (indicating on exhibit)? A. Yes, the beam piece.

Q. The one underneath here (indicating on exhibit)? A. Yes.

Q. And you went under there and Godo was ahead and he got [138—78] down on his hands and knees to crawl through? A. Yes.

Q. And he crawled out there and started through? A. Yes.

Q. You never had gone under that building from that direction before, had you? A. No, sir.

Q. Now, with the exception of the ringer foundation and elevator-well and foundation of the tank or something way over in here, that packing-house is all open in there, is it not—all open under the glue-house?

A. I guess it is; it is open where we were.

Q. It is open all around through this part of it (indicating)? A. Yes.

(Testimony of Nels Olson.)

Q. Did you notice or observe the conditions around there when you went under that day with Louis?

A. No, I never.

Q. I show you Defendant's Exhibit 4. Do you recognize that piece there—what is that?

A. That is the counter-weight.

Q. Is that the space you crawled through?

A. Yes, sir.

Q. Did you notice the place on either side of it?

A. No, sir.

Q. Do you know whether or not there was a space there? A. No, I could not say.

Q. Have you ever been back there?

A. No, sir.

Q. Did you observe—

A. Not until after he was hurt. [139—79]

Q. Was there a space there afterwards that you noticed? A. I did not notice it.

Q. Right ahead here where figure 4 is on the exhibit, was that open right through there? A. Yes.

Q. I will call your attention to Number 3, and call your attention to Mr. Alstrum sitting in there. Is that the condition it was in that day?

A. It seems like there was a few boards in here (indicating).

Q. A few boards in here?

A. In here; I took Louis around here through this way.

Q. Louis was on the other side of that?

A. Yes.

Q. But this place was open?

(Testimony of Nels Olson.)

Mr. TEATS.—I object to that, as interrupting the witness.

The WITNESS.—I took Louis around.

(Question repeated.)

A. He was in here. I got through here (indicating).

Q. You took him around through these beams there? A. Yes.

Q. Around through where the picture of Alstrum is? A. Yes.

Q. There is nothing to hinder, when you first went in there, in going through where you see that figure 3 is to where Alstrum is in the picture?

A. I could not say. I never paid any attention to it.

Q. You do not remember about that? A. No.

Q. That packing-house was all open under there with the exception of the shaft? [140—80]

A. Yes.

Q. Now, as a matter of fact, it was muddy all underneath there, wasn't it? A. Yes.

Q. And wet? A. Yes.

Q. And most any place you stepped down you got in the mud, and got in pretty deep in some places?

Mr. TEATS.—He said yes; nodded his head.

The COURT.—Sometimes you nod your head and don't speak, and sometimes the jurors might not be looking at you. Court proceedings are carried on in the English language and not by sign language.

Mr. EVANS.—Q. How long had you been there at

(Testimony of Nels Olson.)

the packing-house, how long had you worked there?

A. I have been working there once before.

Q. Did you ever know of anybody going under that packing-house at the place you went under?

A. No, sir.

Q. Did you ever know of anybody going under there and under these counter-weights too?

A. No, sir.

Q. Did it have the appearance of anybody having gone in there, that you can tell?

Mr. TEATS.—We object.

A. No, sir.

Mr. TEATS.—We object.

The COURT.—Objection overruled.

Q. What was the answer?

A. No, sir. [141—81]

Q. Now, when you came out, you and these other men brought Mr. Godo out, you said that you met Pete Cornils? A. He was right there.

Q. And Charlie Lundgren?

A. Yes, that was after.

Q. Was there anything said there at that time?

Mr. TEATS.—We object to that.

The COURT.—Objection overruled.

Q. Was there anything said there at that time?

A. Pete said, "For God's sake! Why didn't you tear up the planks instead of going underneath the building?" Pete said to him.

Q. That was when you brought him out from under the building?

A. After he was sitting on the plank.

(Testimony of Nels Olson.)

Mr. TEATS.—I move to strike that out as immaterial and self-serving, and not shown that it was addressed to the plaintiff when he was in a condition he could understand.

(Discussion.)

The COURT.—It is a matter the jury will understand was directed to the plaintiff himself. What reply the plaintiff made might be pertinent, but the jury will at the same time take into consideration the condition the plaintiff was in, in regard to whether he could make an intelligent answer.

Q. Did Godo say anything in answer to that?

A. I cannot remember that he did.

Q. Did you talk to Godo there at the time?

A. Yes, I talked to him.

Q. Did he ask you for a drink of water?

A. No, I went and got the water. [142—82]

Q. Did he talk to you, you say?

A. No, he did not say much.

Redirect Examination.

(By Mr. TEATS.)

Q. He didn't even respond to what Pete said, you said? A. No, sir.

Q. He was too sick? A. I guess so.

Q. He was in a semi-conscious state, was he?

(Question objected to, and objection sustained.)

Q. You are working for the company yet, aren't you? A. Yes.

Q. And you have been in these lawyers' offices a good deal talking about the case?

A. I was up there once.

(Testimony of Nels Olson.)

Q. Now, when you answered the question as to whether or not the ground there had the appearance of anybody being down there or going through there, what did you mean?

A. I did not notice anybody going through there.

Q. You did not notice anybody going through?

A. No.

Q. If anybody had walked through there you could not have seen the tracks, could you?

Mr. EVANS.—We object to that as cross-examination of his own witness and not proper redirect examination.

A. I have never noticed.

The COURT.—The objection is overruled. It is leading. You have the right to get at the condition. The object will be sustained on the grounds it is leading. You suggest by [143—83] the mere form of your question what answer you desire.

Mr. TEATS.—Now, you say that you have not been under there since?

Mr. EVANS.—Objected to.

The WITNESS.—No, I did not say that.

The COURT.—It is preliminary; objection overruled.

Q. You did go under there since the accident, did you not? A. Yes, sir.

Q. And look at this Exhibit No. 3. Look at No. 4. Now, when you went under there did you notice any openings here as marked Number A and B in photograph No. 4? A. No.

Q. What did you go under there for?

(Testimony of Nels Olson.)

A. I do not know what I went under there for at the time he was hurt.

Q. No, afterwards?

A. Went and boarded up this hole here.

Q. Did you board up this hole?

Mr. EVANS.—I object to that as immaterial, and move to strike both the question and the answer on the ground that it is a change made in the premises after the accident, and has nothing to do with the accident in controversy in this case.

The COURT.—Objection sustained as to this question, but as the former answer may bear on the photograph the motion will be denied.

Q. Did you pass in through here under the glue-house at all when you went under there the second time?

A. I went out here and,—let's see. Here is where I went under the second time, and I boarded up this front side first, and then I went around here and boarded up this other side. [144—84]

Mr. EVANS.—I move to strike that as immaterial. This was after the accident, and when some boarding was put up is incompetent, irrelevant and immaterial.

Mr. TEATS.—His answer is clearly material, because he said when he went there he followed around here through this way to the right, instead of going to the left.

Mr. FLETCHER.—It is not what he did, but what the conditions were at that time.

The COURT.—The objection is sustained and mo-

(Testimony of Nels Olson.)

tion granted, and the jury instructed to disregard that answer. If he made some alterations there that may bear on the photograph as indicating what the condition was before, he may state, but what his work called him to do and how he got around there afterward has nothing to do with this case.

Q. How long was it after the accident you went in there? A. I could not remember.

Q. About how long?

A. I have no idea how long it was after that.

Q. How large was this space where the counter-weight fell there?

A. I did not measure it. I do not know.

Q. You know you were there?

A. I know I was there.

Q. Big as that door back of you (indicating door in courtroom)? A. No.

Q. Big as the panel back of you in that door?

A. I do not know how large it is.

Mr. EVANS.—That is objected to as to the form of the question. [145—85]

The COURT.—The objection is overruled.

Mr. EVANS.—Exception.

Q. Could you say whether a man could go through there without getting on his hands and knees?

A. I could not say.

Q. Well, you went through there?

A. Yes, I went through there.

Q. Did you get down on your hands and knees or walk through?

(Testimony of Nels Olson.)

A. Got down on my hands and knees and crawled through.

Q. Was it necessary to go through to get on your hands and knees, or could you get through there in a stooping position?

A. I believe a man could stoop and get through there.

Q. Look at Number 4 and the space above the figure 4. My understanding is you found Godo toward the space where the weight came through.

A. Yes.

Q. And then you took him around to the south—

A. Yes.

Q. Of the timbers? A. Yes.

Q. Now, what was in this space at that time, if anything?

A. Seems like there were a few boards up and down in here (indicating).

Q. A few boards up and down between the big timbers at the space where figure 4 is and above that space? A. Yes; right in here.

Q. Just indicate where that is on the map.

A. Just about like this from here over to there (indicating on the plat). [146—86]

Q. How many boards?

A. I could not say how many boards.

Q. Do you remember who was present when you heard Pete say something about why didn't you take up the plank on the wharf? Who was present then?

A. I cannot remember who was present.

(Testimony of Nels Olson.)

Recross-examination.

(By Mr. EVANS.)

Q. I want to ask you if, as a matter of fact, the boards you testified to here by the figure 4, if they are not further down by the other end of the space.

A. Down in this space?

Q. Down to this end, this end of the beam, instead of up here? A. I cannot remember that at all.

Q. Would you be positive there were any boards there? A. It seems to me like there is.

Q. Are you sure? A. Yes, I am sure.

Q. How many boards are there?

A. I could not say how many boards there were there.

Q. Was there one or two or three?

A. I could not say.

Q. Could you say there was one? A. Yes.

Q. Was there two?

A. I know I took him around this here.

Q. You took him around there. There was a big open space right there, wasn't there?

A. Yes. [147—87]

Q. You could have brought him through there and brought him out the way you went in if you wanted to, couldn't you?

(No answer.)

Q. When you went under there to work, when you were building that ringer foundation, as a matter of fact it was about five feet and six inches from the mud to the floor? A. I would not say for sure.

Q. You had plenty of room to work? A. Yes.

(Testimony of Nels Olson.)

Q. Plenty of room all around clear under there?

(No response.)

Q. Now, as to the space here, what is the height here, right here by this figure 4, from the mud?

A. Six or seven feet right in here. I would not say that it was seven. I would say that it was about five or six feet.

Q. How wide was the space between these two timbers, one marked 4 and one marked with 2X?

A. I could not say how far.

Q. Approximately between these two how high, was it? A. Oh,—

Q. Four feet? A. Something like that.

Q. Was it more than four?

A. I would not swear to it.

Q. You think it was about four? A. Yes.

Q. Now, when you get through that four, the place that we have indicated by 4 and 2X, and then inside of that, it was from five to six feet, five and a half feet? [148—88]

A. I would not say how wide it was in there?

Q. The ringer is right in there, isn't it?

A. No, the ringer is over this way.

Q. It was just about the general condition under the whole thing; there is not much slope there.

A. I did not pay much attention to what form the ground is in there.

Q. But there is room to walk around all of that?

A. Yes.

Q. And that applies clear back to the back end, clear back to the elevator shaft, does it, or do you

(Testimony of Nels Olson.)

know what the condition is back there?

A. No, I was not in there.

Q. I will ask you if, as a matter of fact, Mr. Clark was not present at the time Mr. Cornil made the remark you testified to after Mr. Godo was hurt?

A. I could not say for sure now whether he was there or not.

Q. Do you remember seeing him around there at that time?

A. I could not say for sure whether I did or not.

Q. What is your best judgment—did you see him around there at the time of that accident?

A. I cannot remember. I was excited after the accident. I did not pay much attention to anything.

Q. Now, Mr. Olson, Mr. Teats asked you what you did after that. You went and took that plank up on the outside and took the measurements, didn't you?

A. Yes.

Q. Right after Godo was hurt?

Mr. TEATS.—We object to that as not proper cross-examination.

A. I do not know what time it was after. [149—89]

The COURT.—Objection overruled.

Mr. TEATS.—That is not cross-examination as to what he did, after coming out and making a tank.

The COURT.—Objection overruled.

Q. You wanted to find this timber to rest the tank on, didn't you? A. Yes, sir.

Q. You took the plank up right there, didn't you? (Indicating on the photograph.) A. Yes.

(Testimony of Nels Olson.)

Q. Took your measurement and set that in there?

A. Yes, sir.

Mr. TEATS.—We object.

The COURT.—Objection overruled.

Q. You discovered when you came to cut that wharf away the foundation of the packing-house, this side here, run clear down to the mud, didn't you?

A. Yes, sir.

(By Mr. TEATS.)

Q. You did not know it before when you went in there to make this measurement, did you?

A. No, I never knowed it.

Q. Who took out the plank? A. I did.

(Witness excused.) [150—90]

[Testimony of W. M. McArthur, for Plaintiff.]

W. M. McARTHUR, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Where do you live?

A. 3601 East K street, McKinley Park.

Q. What is your business?

A. Well, carpenter work and millwright work.

Q. How long have you been working at that work?

A. Well, I have been working at that work somewhere along about two and a half or three years; somewhere, millwright work.

Q. Did you ever work for the Carstens Packing Company? A. Yes.

Q. When did you work for them?

(Testimony of W. M. McArthur.)

A. I worked there—I got laid off there, I think it was somewheres along last April.

Q. When did you first commence working for them?

A. Excuse me a minute. Let me study just a moment. No, it was in February—either February or March that I got laid off there.

Q. 1912? A. Yes, sir.

Q. When did you first commence working for them?

A. Well, I don't just remember the date when I commenced working for them. I worked for them somewheres along about three years—two and a half or three years.

Q. All the time?

A. Yes, sir; from the time I commenced working at all for them. [151—91]

Q. Who was your foreman?

A. Well, Charlie Lundgren was our foreman, and Mr. Cornils, I suppose, was master mechanic.

Mr. EVANS.—I object to what the witness supposes.

Q. Who gave you orders for work?

A. Well, sometimes Mr. Lundgren gave it to us and sometimes Mr. Cornils.

Q. With whom were you working?

A. Well, I was working from the time with Mr. Beyer after he came there.

Q. After he came there?

A. Yes, after he came there. I was working there when he came.

(Testimony of W. M. McArthur.)

Q. What part of the plant did you work on?

A. Well, we were working all over the plant. We were all over the plant.

Q. Do you remember of the cable or counter-weight of the elevator at the glue plant, the glue-house, breaking? A. Yes, sir.

Q. And who repaired that?

A. Mr. Beyers and myself.

Q. And where did that counter-weight run?

A. Well, it run down through the building close to the elevator shaft.

Q. Which side of the elevator shaft?

A. Well, it went on the south side of the shaft.

Q. The southwest corner, was it?

A. What I mean by the shaft is the well-hole where the elevator comes down.

Q. And the counter-weight run outside of the shaft?

A. Yes, it run on the outside of the well-hole.
[152—92]

Q. Now, do you know where the weight stopped when it was down below at rest before you repaired it? A. Before I repaired it?

Q. Yes. A. It stopped even with the floor.

Q. And when it broke what became of the counter-weight? A. You mean when the cable broke?

Q. Yes. A. Dropped down into the mud.

Q. Whereabouts?

A. Well, I should judge it broke about six or eight inches above the eye in the counter-weight.

(Testimony of W. M. McArthur.)

Q. What was about the weight of that counter-weight?

A. I do not know. It weighs somewheres along about, I should judge, eighteen hundred pounds. Of course, I would not be positive, because I ain't never,—

Q. About how long was the pieces of the weights? It is made up of individual weights, isn't it?

A. Yes, individual weights. They are somewheres about two feet long, to the best of my knowledge.

Q. Connected together?

A. Well, they are connected together, yes; they are connected together with rods.

Q. How do they run—up and down? What do they run up and down between?

A. There is a guide. In the end of the counter-weights there is a slot or slotted notch holed out, cut in there so that they run down the slide just the same as running along that (indicating and illustrating); they are slotted in so that when they get down the guide they [153—93] follow the guide right straight down, so that they are supposed not to get out of the guide.

Q. Now, after the cable broke, what did you do first about repairing it?

A. Well, the first thing we done was to get that counter-weight up out of the ground; we could not do anything else.

Q. Whereabouts were they?

A. Well, they were down in the mud in the bottom of the track.

(Testimony of W. M. McArthur.)

Q. Look at Number 3; do you recognize that as the place?

A. No, that does not look like the place to me.

Q. Look at Number 4; does that look like the place? A. No, sir, it does not.

Q. Now, look at the map here, A, at the time you went in to repair this was the new addition on?

A. No, sir; it was not.

Q. Whereabouts did you go and which way did you go to get to the weights then in the mud?

A. At the time we repaired the counter-weights we went in from the west side, as I should call it, next to the railroad track from the west side, on the south side of the platform we run down. There was an incline run down from the platform down where they run trucks down.

Q. Little door there?

A. There was a door there; yes, sir.

Q. Now, we will say this is the door here on this map. Which way did you go to get to the counter-weight?

A. We passed in from the west side, from the west side, and come right in here and got over the sill and come in here and then we come in here; that is, to fix the counter-weights [154—94] (witness indicates on Identification).

Q. Can you trace the line here?

(Witness does so.)

Q. Do you recognize this as representing about the situation? A. Yes.

(Testimony of W. M. McArthur.)

Q. This represents the platform and this is the little door?

A. This platform did not run in—well, was this line here? This line of the building run all along here. This is the line of the platform and this is the little door we went in here, and we went in here and went through here and got right through here and crossed the main—

Q. Make a blue line where you went.

A. We entered at this little door right here, got right through here, crossed over this sill and got over here to the counter-weights. The counter-weights lay down in here.

Q. In the mud there?

A. They were right down there in the mud, right at that place. This is the hole, and the counter-weights dropped right down through here, and we had to get right in this hole and get over this hole and get in here and fix these counter-weights. And when we got in here we would fix it.

Q. What was the condition of the ground along in under the platform? A. Well, it was muddy.

Q. We will call this mark you made “McArthur.”

Mr. FLETCHER.—Mark that other line Olson.

Mr. TEATS.—And over here is “Godo.”

Q. What was the condition of the ground under the platform [155—95] and up to the place where the weights went into the mud?

A. Well, it was all muddy and watery and mirey in there. We had to put plank down in order to walk.

(Testimony of W. M. McArthur.)

Q. Where did you put down plank?

A. Well, we put down plank along from that timber, the center timber that ran through the building there across to the hole, and on the other side also because we worked on both sides of the counter-weight.

Q. Was there a space here where the counter-weight was?

A. Of course we could pass through there. The counter-weights were down and we passed through there.

Q. How large a space was that?

A. I should judge two feet. I didn't never measure it. I suppose it was about two feet wide where the counter-weights come down.

Q. And how high?

A. It was about three; between three and four feet from the joist down to the mud. I knew we had to stand this way when we were down under there (illustrating). We could not straighten up under there.

Q. In a stooping position, about half?

A. Just about half, I guess. I never measured the distance.

Q. Now, what did you do in repairing the weight?

A. Well, we *go* the weights up out of the mud, we blocked them up underneath, took some blocks and blocked them up underneath in order so as to hold them there until we could fasten on to the eye of the upper counter-weight. Well, then, we had to go, in order to get length enough, we had to go to work and take a turn off the drum up at the elevator where

(Testimony of W. M. McArthur.)

the cable is wound around. [156—96]

Q. How much of a wrap of cable did you use in making the splice?

A. Well, I should judge about eight or ten inches.

Q. And after you made the splice did you notice where the weight ran down? A. Yes, sir.

Q. How far down would it run?

A. Well, it come within about eight or ten inches of the cross-piece below.

Q. Cross-piece below?

A. Yes. It had been—of course, it had been broken down on account of the weights coming down.

Q. Who gave you your orders to make that repair?

Mr. EVANS.—We object to that as immaterial.

Mr. FLETCHER.—Mr. Godo is not connected with this in any way; it is independent work.

The COURT.—Objection sustained.

Mr. TEATS.—On what ground.

The COURT.—It is too remote. It might possibly have some bearing on the case and then again it might not.

Q. I will ask you whether or not Mr. Cornils, the master mechanic, knew of your making these repairs.

Mr. EVANS.—We object to that as leading, suggestive, incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—On that ground, that is asking whether he knew or not. Note an exception.

Q. While you were making these repairs was Mr. Cornils around?

Mr. EVANS.—Objected to as immaterial.

(Testimony of W. M. McArthur.)

The COURT.—Objection sustained. [157—97]

Q. About when did you and Mr. Beyers make these repairs?

A. Well, to the best of my knowledge it was in the latter part of April or 1st of May. That is the best of my knowledge.

Cross-examination.

(By Mr. EVANS.)

Q. If the time-book shows it was in January, you would not be positive, then, would you, Mr. McArthur? A. What is that?

Q. If the time-book of your time shows that that change was made, that repair was made in January, then you will say that you are mistaken about it being April or May, wouldn't you?

A. I do not know. I do not know whether I would remember or no.

Q. You saw the time-book there, did you not?

A. I did not see it, no. I did not see the time-book myself, no, sir. I did not look at the time-book.

Q. Who were you working under the time you made that repair?

A. Under who was I working under, do you say?

Q. Who was your boss that day?

A. Why, the boss we *always when we wanted*—Charlie Lundgren or Pete Cornils; did not make any difference which one. Of course they both gave orders, but at that time, if I remember right, Mr. Lundgren gave us orders to fix the elevator. I would not swear to it, positive, but I think to the best of my

(Testimony of W. M. McArthur.)

knowledge he was the man who gave us the order.

Q. I will ask you if you went over to the packing-house a [158—98] day or two ago and had a talk with Mr. Belcher.

A. I was over to the packing-house; yes.

Q. Did he not show you that book?

A. No, he did not show it to me. He did not give it to me.

Q. Didn't you look at the book?

A. No, sir, I did not.

Q. Didn't he show you the time in January?

A. No, sir; he had the time but he never showed it to me.

Q. He stated it to you from the book? A. Yes.

Q. You said if the time-book says that it must be so? A. I might have said so; yes.

Q. You told him at that time you were not positive when this was made?

A. I told him I was not positive whether it was the last part of April or May.

Q. Did you ever have it before?

A. No, sir, I never seen the time-book; never had it in my hands.

Q. He did not hold it up where you could have seen it?

A. No, sir, he had the time-book in his own hands.

Q. Mr. Lundgren kept the time, didn't he?

A. Yes, sir; Mr. Lundgren is supposed to keep the time, yes, sir.

Q. He had a book of this kind?

A. Yes, I suppose he had. We gave him our time

(Testimony of W. M. McArthur.)

as to work, and I suppose there is the book he put it in. I could not say positive.

Q. When you would give him the time he would put it down, wouldn't he? [159—99]

A. He was supposed to put our time down.

Q. Did he?

A. I could not tell you. I do not know whether he did or not.

Q. Do you know his handwriting?

A. No, sir, I am not acquainted with his handwriting; I never paid any attention to it.

Q. When was the new building put up, the new addition? A. The new addition?

Q. Yes.

A. Well, that new addition, I think, was put in along in May.

Q. In May? A. Yes.

Q. You don't know whether the repairs were made in April or May?

A. I am not positive. They were in the latter part of April or 1st of May.

Q. But it was before the new addition was put up?

A. Yes, sir; it was before the new addition was put up.

Q. How long before, according to the best of your recollection?

A. Well, I think that new addition was put up the forward part of May, if I am not mistaken; well in May.

Q. How long before that was it you made this repair?

(Testimony of W. M. McArthur.)

A. I could not say; we were repairing over there, all over the shop.

Q. It is largely a question of guess with you as to the time?

A. Well, I was judging. I was saying to the best of my knowledge it was the last of April or first of May, the best I can remember that day.

Q. To the best of your knowledge? [160—100]

A. Yes.

Q. Can you remember the month you did any other specific work there?

A. No, I cannot, because I never paid much attention to the work we did, because we were all over everywhere.

Q. You testified that counter-weight was down in the mud? A. Yes, sir.

Q. Underneath the counter-weight was a mudsill or plank, heavy plank, wasn't it?

A. There was a plank along there; yes, sir.

Q. The counter-weight when it broke and the cable broke ran down on the guides? A. Yes, sir.

Q. And struck that plank?

A. Yes, sir, struck that plank.

Q. And broke it? A. Broke it, down through it.

Q. But part of the counter-weight was still up here on the guides?

A. No, sir. The counter-weights was right down into the mud, with the exception of two. There were two counter-weights that were on top of the mud.

Q. Two of the sections were still up there?

A. Two of the sections were still up there, but they

(Testimony of W. M. McArthur.)

were not in the guides; they were clean down out of the guides.

Q. They were? A. Yes, sir.

Q. There was not any broken joist above the counter-weight at all?

A. No, sir, I do not think there was. I would not say that [161—101] there was.

Q. Say this is the floor up here (illustrating), and then the guides come from here down; there is a joist up there? A. Yes, sir.

Q. That was all right? A. Yes, sir.

Q. And the only thing that was broken was the one where it hit down here? A. Yes, sir.

Q. Did you make any memoranda as to the time that you did that work?

A. No, I never keep any memoranda at all.

Q. Just a matter of recollection?

A. Recollection, the best I can recall. I never tried to keep any time at all.

Q. Might have been a few weeks earlier or later, and you could not swear to that? A. Sir?

Q. Might have been a few weeks later or earlier?

A. I would say it was either in the latter part of April or the first of May, to the best of my knowledge.

Q. How are you able to fix the latter part of April or first of May—what makes you fix that time?

A. On account of the time we put up that new building; that is what I am going from.

Q. How long was that before that?

A. Yes, sir.

Q. How many weeks before?

(Testimony of W. M. McArthur.)

A. I could not say positively.

Q. How does the putting up of that new building enable you [162—102] to fix the time?

A. On account that I knew the new building was put up by that time, and I knew it was just before the new building was put up we fixed the counter-weight.

Q. How long before, approximately?

A. Well, I have said I would not undertake to say the date for I cannot.

Q. You do not know when that building was put up?

A. No, I could not say the date the building was put up; it was put up in May.

Q. In May?

A. Yes, sir; sometime in the fore part of May.

Q. In the fore part of May? A. Yes.

Q. Was it a week or two weeks or three weeks or five weeks, you think, before you did that work?

A. I cannot say it was a week or five weeks or not.

Q. It may have been as far back as February, as far as you know? A. No, I do not think it was.

Q. You would not say that it was not four weeks back?

A. I would say just as I said before, either in the latter part of April or forepart of May.

Q. (By Mr. TEATS.) What would you say as to that repair being done in January?

A. Well, I do not think it was done that time. I think it was done later. I think it was done just as I said, either in April or May.

(Testimony of W. M. McArthur.)

Mr. EVANS.—Q. That is just a think; you do not know?

A. Well, I say in the best of my knowledge; yes, sir. [163—103]

Q. There is one other question I wanted to ask you; how many times had you seen these counter-weights below the floor before you went down there to repair it?

A. How many times had I saw them below the floor?

Q. Yes. A. I never seen them below the floor.

Q. Had you been in there before to see them?

A. Well, I had been down. I was down under that building not so awful many times, but two or three times before.

Q. Did you observe the counter-weights at that time?

A. Yes. When I went down there I could not help but observe them, because I went down there to see if they were there all right at the times. What I mean is,—listen now,—the guides that run the elevator, the guides that the counter-weights come down on.

Q. How many times while you were underneath did you see the counter-weights operate?

A. Oh, I could not say as to that. I could not say as to the amount of the times that they operated, but I have seen them going up and down there several times, and I would not say as to how many times.

Q. You can see them by looking up there, could you?

(Testimony of W. M. McArthur.)

A. You can see them by looking up, yes; if you got down in there to look up you could.

Q. Now, as a matter of fact, if the elevator did not run just steady, then the counter-weights go a little lower as your elevator goes higher?

A. Yes, certainly; if the elevator does not go clean up the counter-weight does not come clear down.

Q. If clear up and it jiggles a little at the top, the weights [164—104] will go down further?

A. If the elevator goes to the last floor, the counter-weights will go down as low as they are supposed to go.

Q. Did you notice at the time you made the repairs there whether it showed on the track or guide where the counter-weights used to run to?

A. Not down below the floor, it did not.

Q. Not at all? A. No, sir.

Q. Not an inch?

A. No, not down below the floor; it did not come down below the floor.

Q. The guides extended right straight down?

A. It does extend down just the same as this plank right here was the cross-piece (illustrating), the guide come down to that cross-piece, but there was not any wear. Understand what I mean by the counter-weights running up and down; I could see no wear on them guides only when the counter-weights dropped that time; of course, naturally it come down then and spread out the guides at the bottom.

Q. The track was fixed right down?

A. Yes, come right down, right down just as close as it could.

(Testimony of W. M. McArthur.)

Q. When you repaired it you took a wind off the drum? A. Yes.

Q. And put it into the eye?

A. Took one wind off the drum above and took and wound it around, I think, if my memory is right, we wound it around the eye towards the counter-weight, just like that (illustrating); went around the eye. We wound it twice, if I remember right, and then we put the clamp on it. [165—105]

Q. And that was the usual and proper way of doing that work, was it? A. Yes, sir.

Redirect Examination.

(By Mr. TEATS.)

Q. Before that break, do I understand you could see the counter-weights come down below the floor before it broke?

A. They come down even, best of my knowledge, about even with the floor.

Q. And then when you were underneath,—

A. Yes, sir.

Q. Underneath you could not see the counter-weights?

A. No, you could not see them. By looking sideways at them this way (illustrating) you could see them. If you looked this way you could see them.

Q. Same as looking up a chimney? A. Yes.

(By Mr. EVANS.)

Q. You could look up there?

A. You could look up there; you could look up this way and see the counter-weights (illustrating).

Q. The guides were open?

(Testimony of W. M. McArthur.)

A. Yes, they had to be.

Q. You didn't have to get down this way and look up (illustrating)?

A. You had to get down this way to look up (illustrating).

Q. Clear down to the bottom?

A. You had to get down to the mud and scrooch up and look under the joist. [166—106]

Q. Clear down to the mud?

A. Yes. You had to stand on the mud.

Q. Get your ear on the mud?

A. No; you would not have to get your ear on the mud, but you would have to stand humped over this way in order to look under there.

(Witness excused.) [167—107]

[Testimony of H. E. Hanson, for Plaintiff.]

H. E. HANSON, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. H. E. Hanson.

Q. Where do you live?

A. 112 South 36th street.

Q. How long have you lived in this city?

A. Thirty-one years.

Q. What is your business? A. Carpenter.

Q. Have you ever worked for the Carstens Packing Company?

A. Different times; three or four different times.

Q. When did you work for them—what date?

(Testimony of H. E. Hanson.)

A. The last time was in April and May last year; a year ago last April.

Q. What did you work at then?

A. The new building, new construction.

Q. What was that building?

A. An addition. The first work I done was between the two, the glue-house and another house, roofed over between the two, that was in April, and last year I put an addition to the glue-house.

Q. That is the addition that you see here on this map A, called "addition to the glue-house"?

A. Yes, that is the addition.

Q. Do you remember about when you commenced on that addition?

A. I cannot say exactly the date. I say I started the first [168—108] of April and I completed a roof on there, and that was the latter part of April or first of May, I could not say the date exactly because I started the first of April to do the work, somewheres the first days in April I started to work.

Q. But you cannot tell when you first started on the new building? A. No, I cannot say the date.

Q. Who were you working under?

A. I was working under Cornils, and Charlie Lundgren was the real boss, the real one.

Q. Do you remember an accident to Louis Godo?

A. I do.

Q. How near completed was the new addition at that time? A. It was up.

Q. Up, was it? A. Yes.

Q. How near completed?

(Testimony of H. E. Hanson.)

A. I worked on the door in front, fixing the sliding door in the front.

Q. Which is the sliding door?

A. Right in the middle, that sliding door in the west end in the middle. There is a sliding door on the west end of the building.

Q. And about the center of the addition?

A. About the center of the building, yes. I fixed the sliding door, putting pipes, and fixing the sliding door at that time.

Q. Did you see Godo and Pete Cornils just before this accident? [169—109]

A. Yes.

Q. Where?

A. Mr. Cornils at a bench, and Godo was over there. They worked over there and had a bench. I do not know what he done because that was not my business to attend to what he did, and I had nothing to do with them, but they were working on that bench there. I was putting a pipe in. I was down to put my brace and screw-driver away. I was just by the corner and at my box. Cornils came along and said to Louis, "I want you to go with me and take measurements," and he walked out. That was all it was.

Q. Whereabouts were you when that conversation occurred?

A. I was right by the corner, right by the tool-box by the corner, right by the northwest corner. The tool-box was right there.

Q. How far away from you were Godo and Pete?

(Testimony of H. E. Hanson.)

A. I could not say exactly the feet.

Q. About how far?

A. It would be about eight or ten feet; something like that.

Q. To the north of the building? A. Yes.

Q. Then when did you hear of the accident?

A. I was up,—I had a scaffold putting the pipes up, and I had my brace and bit and I went up on the scaffold,—

Mr. EVANS.—I object to that as immaterial when he heard of the accident.

The COURT.—Objection overruled. You were asked when you heard of the accident and that is all of the question, and you started out on something else. Do you know when you heard of the accident? Just answer the question. [170—110]

The WITNESS.—About half an hour or something like that. I could not say exactly the time or minute, because I did not look at the time. I was working and so I did not look at the time. Some little time.

Q. What did you do as to Godo?

A. I took my brace and bit and went up on the scaffold above,—

Q. When Godo got hurt what did you do?

A. I was working there putting that door—working at that door.

Q. What did you do then?

A. Oh, hanging the door, putting the pipes and hanging that sliding door.

Q. And what did you do? A. What did I do?

(Testimony of H. E. Hanson.)

Q. Yes. A. The sliding door—

Q. I mean as to Godo; did you help get him out?

A. I jumped underneath and dragged him out.

Q. Where did you get Godo?

A. I was halfway under the building when the fellow come dragging the gentleman out, and I helped drag him out.

Q. What condition was Godo in at the time when you first saw him underneath?

A. I thought he was close to death; that was the way I looked at it.

Q. And what did you do with him?

A. We dragged him out and put him on some boards or planks that was there.

Q. And what condition was he in when you got him over to the plank? [171—111]

A. Well, pretty bad. I could not say. He looked pretty bad to me, and bleeding, and I could not say how bad he was, but he looked pretty bad to me.

Q. Did he talk to you? A. No.

Q. How long did you stay there with Godo?

A. I just stayed there a little while and I went up and took his overalls off, and went up and hung up his overalls and took his tools out and hung them up where he had his tool-box.

Q. Did you see Pete Cornils there?

A. I saw him; yes.

Q. When did Pete come up there first?

A. A little after, I could not say how long, how many minutes, but a little after he come up.

Q. Did Godo have anything to say at that time?

(Testimony of H. E. Hanson.)

A. No, I did not hear him say anything. I heard Godo say nothing there at all.

Q. Now, when you commenced building the new addition, what did you do with the platforms that run along the side of the old place?

A. Tore that out.

Q. And what did it leave?

Mr. EVANS.—We object to all of that as immaterial. The details of that work he did there would have nothing to do with this case; it is encumbering the record.

The COURT.—The objection is sustained. It is too general. It does not show whether it is applicable or not.

Mr. TEATS.—It is a preliminary question.

Q. Now, when you tore away the platform could you see the [172—112] condition of the ground beneath the platform, the old platform?

A. Pieces between—

Q. How?

A. Partly between. The wood was loose, very loose. If I wanted to look through I could look through underneath, but it was boarded up, it was all boards.

Q. What do you mean by that? I do not understand what you are driving at.

A. It was not tight boards, it was old boards, being cracked so I could look through.

Q. But where was that?

A. Before the platform was moved.

Q. When you took the platform away could you

(Testimony of H. E. Hanson.)

see down on the tide-flats? A. Oh, yes.

Q. What is the condition there?

A. Well, the condition that is that way underneath there. I would not advise anybody to go under there, and I did not like to go there myself.

Mr. EVANS.—I move to strike the answer as not responsive.

The COURT.—Motion granted and the jury instructed to disregard it.

(Question repeated.)

A. It is mud, and well, I could not mention all the things. If a man stepped in there he would go to here (indicating hips), right in the mud of all kinds. There is dirt of all dimensions and where they come from I could not say.

Q. Filth?

A. Filth of all kinds. It is all kinds of things. I stepped [173—113] into here myself (indicating), and I know there is.

Q. When you built the floor to the new addition how high up on the old glue-house did that go as compared with the platform?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. I will ask you whether or not the floor of the new addition was higher or lower than the floor of the platform.

Mr. EVANS.—I object to that as immaterial.

The COURT.—The platform—is that the wharf?

(Testimony of H. E. Hanson.)

Mr. TEATS.—No. The platform that was built on the west end of the glue-house with the runway down below here, and it was about three feet above the wharf.

The COURT.—Objection sustained.

Cross-examination.

(By Mr. EVANS.)

Q. Now, how long were you engaged in the construction of that new part, how many weeks, until you got down to where the sliding door was?

A. Well, now, I could not say how many days I was working there. I could not say that.

Q. Was it one week or two weeks or three weeks or five weeks?

A. I could not say how many days I was working. Sometimes I go there and I worked there the biggest part of the day, and then go away maybe to go to do some other work over here, and I could not tell you how many days.

Q. When did you start to work on the new building? [174—114]

A. Well, I started at the work in April.

Q. In April? A. First of April.

Q. When in April?

A. In April, before we started on the other part.

Q. When did you start on the new addition?

A. I could not fix the date of that addition.

Q. How long were you working on the other part you say you were working on?

A. I could not say that either.

Q. Two or three weeks or two or three days?

(Testimony of H. E. Hanson.)

A. I do not have the time.

Q. Have you any idea? A. I could not tell you.

Q. Do you keep your own time?

A. I kept my time to see how much money I got, that is all I had, but I did not keep track of work, how many days I worked on either place.

Q. Who is the timekeeper?

A. Well, we ring up the time-cards there and I do not know who is in there as timekeeper.

Q. You kept your own time, did you?

A. I kept my own time, always.

Q. Have you got your time-book? A. No.

Q. What did you do with it?

A. I have it at home.

Q. You have it at home? A. Yes.

Q. Did you ever look at that and see how long you worked [175—115] there?

A. If I had the time-book—

Q. Did you ever look at the time-book before you testified in this case to find out how long you worked there?

A. Everywhere I worked I have a time-book to see how much money is coming to me. That is all I care for. I did not count the work, what work I did. I just counted the days.

Q. Then the only thing you can really remember distinctly about the time there is that you commenced to work on the old part about the first of April?

A. I do not remember that exactly. I could not answer.

(Testimony of H. E. Hanson.)

Q. You say that you commenced to work on the old part there about the 1st of April?

A. Sometime the first days of April; yes.

Q. And that is about as definite as you can get to it?

A. That is as near as I can get to it. It was a little after election.

Q. The time you started working on the old part and the new addition is simply your recollection now?

A. Well, I worked right along, but I do not know the date when they changed me over. I could not say the date when they changed me from one place to the other. I could not say the date.

Q. You have not any memoranda or any idea as to how long you worked there on the new addition?

A. No; I could not say exactly how many days I worked, but I did know.

(By Mr. TEATS.)

Q. Who was working with you, or did you say?
[176—116] A. D. West is his name.

Q. Vest? A. Yes.

Mr. FLETCHER.—How do you spell it—Vest or West?

A. I could not say how he spelt his name, either.

Mr. TEATS.—Did you have any carpenter helpers on that building? A. Yes, I had one.

Q. What was his name?

A. I do not know his name either.

(Witness excused.) [177—117]

[Testimony of Bennie Carroll, for Plaintiff.]

BENNIE CARROLL, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. Bennie Carroll.

Q. Where do you live? A. St. Paul Avenue.

Q. How long have you lived in this county?

A. Two years last September.

Q. Where were you working on the 27th day of May last? A. Carstens Packing Company.

Q. What were you working at?

A. I was carpenter's helper.

Q. When did you commence working there?

A. Well, sir, I should judge last April or sometime along about the 1st of May.

Q. What did you commence working at when you first went over there?

A. Well, I was on that new shed or new building, or whatever you call it between the two houses, between the schoolhouse and the cannery.

Q. The new addition as we find it here (Exhibit A)? A. Yes, sir.

Q. About when did you commence working there?

A. Well, sir, as near as I can remember, about the last of April or 1st of May; along in there sometime.

Q. When you first commenced working there was there any work done on the new building?

A. Well, they were just starting. **[178—118]**

Q. Just starting? A. Yes.

(Testimony of Bennie Carroll.)

Q. How long had they been working, do you know?

A. Well, now, I could not say. I went over there and struck them for a job and he put me to work.

Q. And where were you when Godo got hurt?

A. Well, I was helping the carpenters when I heard Mr. Olson holler. I run underneath the building.

Q. Where did you go under?

A. Well, sir, it is right, I should judge, about anywhere from three to six feet from the corner of the building.

Q. Which way—south of the northwest corner?

A. Yes, right in above there where you have the mark.

Q. Right in here (referring to Exhibit "A")?

A. Yes, sir.

Q. Which way did you go?

A. Kind of made a circle around like that (indicating).

Q. And where did you go to?

A. I went underneath, as far as there was a porch underneath. I helped drag him out from there.

Q. What do you mean by porch?

A. Platform, before this new building was put on.

Q. Over to here (indicating on Exhibit "A")?

A. Yes, sir.

Q. And when did you first see Godo?

A. Why, he was working around there as a carpenter.

Q. When you went in under?

(Testimony of Bennie Carroll.)

A. It was up underneath there by the porch.

Q. That is the platform?

A. Yes, the platform. [179—119]

Q. Where that old platform was? A. Yes, sir.

Q. Was there any platform there then?

A. Yes, sir.

Q. And you helped take him out? A. Yes, sir.

Q. What condition was he in when you first saw him?

A. Well, sir, I thought the man was dead.

Q. What did you have to do to take him out of there?

A. Just naturally helped to drag him; it was as near as you could get to him.

Q. What did you do then when you got him out of there?

A. We took him out. There was some lumber piled up there, boards or something, and the superintendent came to him.

Q. That is Peter Cornils?

A. No, sir, Superintendent Bill—

Q. McHuen? A. Yes, sir.

Q. He was there first, was he?

A. I could not say as to that.

Q. Who helped you get him out?

A. Mr. Olson.

Q. Who else?

A. If I am not mistaken, Hansen.

Q. The witness that just testified?

A. Yes, sir.

Q. And what condition was he in when you got

(Testimony of Bennie Carroll.)

him out at the planks?

A. He was very bad. I thought the man really was dead or crushed or something. He was fainted, like. [180—120]

Q. How long did you stay there?

A. Well, I was told—the superintendent asked me if I had anything else to do in a few minutes.

Q. Were you there when the hack came?

A. Yes, sir.

Q. Did you help put him in the hack?

A. No, sir; I did not.

Q. Who put him in there?

A. Mr. Cornils and Mr. Charles—the foreman there.

Q. Lundgren? A. Lundgren.

Q. What, if anything, did they do about—did they try to have him sign a paper while you were there?

Mr. EVANS.—We object to that, if your Honor please.

The COURT.—Objection sustained.

Mr. TEATS.—I wanted to show his condition, that was all.

Mr. EVANS.—It is not the way to show his condition.

Mr. TEATS.—Yes, sir, it is a good way to show it.

Mr. EVANS.—No cross-examination of this witness.

Thereupon the jury was admonished and excused until half-past one o'clock, at which time, the call being waived and the jury being present, the trial of this cause is continued as follows: [181—121]

(Testimony of Bennie Carroll.)

Mr. BENNIE CARROLL, being recalled, continues his testimony as follows:

Direct Examination (Continued).

(By Mr. TEATS.)

Q. Do you remember what day you went *work* work?

A. Not exactly, no, sir. That was along about the last of April or first of May; right in there, close.

Q. And what did you first work at?

A. I first worked at—well, it was on that roof business where they were putting up posts for the roof. If you let me point it out to you there?

Q. Yes, come here and show it to me.

A. There was one building over here, another building over here. Across it was a roof. It was the roof of another building, from one building to another.

Mr. EVANS.—Q. Built over afterwards there?

A. Well, it was—I should judge it was probably sixty feet wide; something along there.

Mr. TEATS.—Q. It's between the old glue-house and the building on the other side?

A. Yes, sir, on that side.

Q. And part of it shown in Number 2?

A. If I am not mistaken this was a new building; it was from this building to this one. We put on this roof when we started to work.

Q. So that when you stated you were on the new addition you meant over here?

A. I meant on this building over here.

Q. The roof over the shed?

(Testimony of Bennie Carroll.)

A. Yes. [182—122]

Q. Where they have the wool-pulling machine?

A. Yes, sir. There is no end to this, either end.

Q. It is not enclosed; in other words, only on two sides? A. No, sir.

Q. And that is by the building? A. Yes, sir.

Q. Then after working there on that new roof, where did you go to work?

A. On this building right in front where that shows there.

Mr. EVANS.—I object to this; he went all over this this morning.

Mr. TEATS.—No, he was mistaken when he said the “new building.”

A. Well, they called that the new building when I started.

Q. Do you remember about how long you were working on this new shed?

A. No, sir, I do not. It was several days, I know that.

Q. Now, during the time you were working on this new shed or shed across between the two big buildings, was the elevator out of repair? A. Yes, sir.

Mr. EVANS.—I object to that as immaterial and move to strike it out. There is no complaint about the elevator being out of repair.

The COURT.—Objection sustained, and the jury instructed to disregard the answer.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

(Testimony of Bennie Carroll.)

Cross-examination.

(By Mr. EVANS.)

Q. Mr. Carroll, you went over there and saw that they were [183—123] doing some carpenter work, and struck them for a job; is that the idea?

A. I struck them for a job; yes, sir.

Q. The other men were working on that when you got there? A. They started to work; yes, sir.

(Witness excused.)

At this time the deposition of S. P. Beyer, a witness on the part of the plaintiff, taken on the 10th day of October, 1912, before Leo Teats on a stipulation, was offered by the plaintiff and admitted by the Court and read to the jury.

Mr. TEATS.—I would like to introduce in evidence Identification “A.”

The COURT.—It will be admitted.

Thereupon said Identification “A” is received in evidence by the Court and marked as Plaintiff’s Exhibit “A,” being a plat.

Mr. TEATS.—We have Dr. Quevli and Dr. Ritz, who were subpoenaed; they said they would be here this morning, and each said they were tied up in operations in the hospital and would be here at half-past one. Those are the only two witnesses we have. [184—124]

The COURT.—Have you any objection to proceeding and hearing the doctors later?

(There being no objection, plaintiff rests his case, with the understanding that the doctors might be put on the stand later.)

Mr. EVANS.—I desire to interpose a motion at this time, and ask to have the jury excused, and we can argue that motion, and the doctors can testify later, and that will not change the grounds of our motion.

The COURT.—The testimony of the doctors will simply go to the condition of the plaintiff?

Mr. TEATS.—Yes.

The COURT.—The jury will be excused, and remain within call. [185—125]

Motion [for a Nonsuit, etc.].

Mr. EVANS.—At this time the defendant moves the Court to grant a nonsuit in this cause and take the case from the jury on the following grounds:

First, that the plaintiff has failed to prove a cause of action as laid in his complaint.

Second, that there is an absolute failure of proof of any negligence on the part of the defendant.

Third, that the accident was due to contributory negligence and want of due care and caution on the part of the plaintiff, and

Fourth, that the condition was open and apparent and the plaintiff assumed whatever risk there was.

(Discussion.)

The COURT.—So far as the conditions of an instrumentality like an elevator are concerned, and the operation of the elevator and how low down the elevator counter-weight came, that is such a permanent structure that the defendant must be held as a matter of law to know its condition through use or how low down the elevator weight would come, and if it

constituted a danger, the master would be held to know that, or if it was a latent danger or whether it was an apparent, open, obvious danger. The plaintiff has testified that he was forbidden to tear up the wharf and go down through the floor of the wharf to make this measurement, and so far as the evidence shows if he did not tear up the wharf to go down there there was not any other way than the one he took, than to go outside the building and go through the hole he [186—126] tells of. Now, after being forbidden to tear up the wharf this was the way he would ordinarily go or ordinarily have to go, the master, as the Court views it, might be reasonably held to anticipate that fact, and if he, anticipating the fact he would have to go under the building—the condition under the building is not exactly clear to the Court from this evidence. It is not exactly clear to the Court how much of the time Mr. Godo worked around this elevator shaft on the main floor of the building, nor exactly how apparent it was that this counterweight, if it can be seen at all, would go below the floor of the building after this repair. What view anybody would have of it.

Mr. EVANS.—Underneath?

The COURT.—When he is on the main floor before he goes underneath. In reference to your cases about a man going in a place of danger, I understand those cases are about a man voluntarily going to a place of danger that he knows is dangerous. It is a question of fact whether the plaintiff knew that this elevator weight went below the floor. He seems to maintain that it had only been changed about a

month. There is no positive evidence that he knew it was going lower. There is not any evidence that he knew that it was only a few inches of this cable broken off. There is testimony here from somebody or your question indicated—I do not remember the exact answer of the witness—it was practically a few inches above the eye of the weight. If it had been broken off a sufficient distance above the weight to just take up a length of the cable around the drum or whatever it was rolled around, it would not have gone down below the floor. In this mine case the plaintiff [187—127] testified that he knew that was a shaft and that those cages were going up and down there and it was dangerous, and all the plaintiff's testimony and all the testimony in the case so far might justify the jury in concluding that he still believed, still had a right to believe that this weight was not going below the floor, and if it did not go below the floor there is no danger in the shaft, and so far as under the building is concerned it is not at all clear how great this other space was. According to these pictures there are two openings, one through the elevator shaft and one at the side of it, and you argue that the plaintiff would be held to take care of himself. He says he was taking care of himself, he was trying to keep out of the filth, and if he had no reason to believe that this weight was coming down there rendering that a dangerous place, and if they had laid boards and things there when they took up that weight so that it was clean and a suitable place to go through, there might be a temptation there to go through that way and to keep out of this dirt.

Of course if he knew the weight was coming down he would assume the risk. The Court cannot say that men, reasonable men, cannot differ regarding how obvious that danger was to him. The testimony is it was dark under there, and the testimony is he had not been down there very often or anybody else very often, and from the fact that the shaft was not built up with boards to keep people from going in there would show that the company itself did not think it was very dangerous, or it would have been their positive duty to board it up so that the people [188—128] would not get into it. The motion will be denied.

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed.

(Whereupon, the jury being recalled, the trial is continued as follows:) [189—129]

Thereupon, to sustain the issues upon its part, the defendant introduced the following testimony:

[Testimony of Peter D. Cornils, for Defendant.]

PETER D. CORNILS, who being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. You are hard of hearing, aren't you?

A. You will have to talk a little loud. I am hard of hearing.

Q. State your name to the Court.

A. Peter D. Cornils.

Q. Where do you live?

A. 1010 South 19th street.

(Testimony of Peter D. Cornils.)

Q. What is your business?

A. I am master mechanic, Carstens Packing Company.

Q. How long have you held that position?

A. Since 1903.

Q. Do you know the plaintiff, Louis Godo?

A. Yes, sir.

Q. Was he employed there at any time?

A. Yes, sir.

Q. I show you Defendant's Identification 5 and ask you to state what that is.

A. That is a foundation of the part of the glue-house.

Q. Is that a correct representation of the glue-house foundation?

A. It is a correct representation of the glue-house, or part of it.

Q. What is this? [190—130]

A. That is the elevator-pit.

Q. That you will mark elevator. A. Yes.

Q. What is this space here?

A. That is the space where the counter-weight comes down.

Q. That is marked counter-weight. A. Yes.

Q. What is this space, which I now mark with an X? A. That is a vacant space.

Q. What is this space I now mark with XX?

A. That is another vacant space.

Q. How wide are those two spaces on either side of the counter-weight?

A. One of them, I think, are 14 inches and the

(Testimony of Peter D. Cornils.)

other 15 or 16 inches, in that neighborhood.

Q. At the time Godo was hurt were those spaces there? A. Yes, sir.

Q. How far was it from the mudsill to the joist above? A. Five feet six inches.

Q. Do you know where the counter-weight formerly ran before the cable broke? A. Yes.

Q. State whether or not it stopped above or below the floor.

A. Stopped below the floor.

Q. How far below the floor did it go?

A. Between 15 and 18 inches.

Q. Have you seen it—you tell that from observation or how?

A. The proof would show there to-day if a man goes there to the house and looks at it.

Q. Have you seen it before the break in question when the [191—131] counter-weight came down below? A. Yes, sir.

Q. I call your attention to the ringer. When was that ringer foundation put in?

A. It was put in in the middle of April.

Q. Was that before or after the break in the elevator cable? A. It was after.

Q. When, if you know, was the break in the cable which held the counter-weight?

A. As near as I can recollect, it was in the middle of January.

Q. Can you state as a positive fact what month the change in the cable, lowering the counter-weight, was made? A. In January.

(Testimony of Peter D. Cornils.)

Q. In January, 1911? A. Yes, sir.

Q. Did you hear Mr. Godo testify?

A. I heard some of it; most of it I did not understand.

Q. Did you hear him testify as to some instructions that you gave him?

A. Well, not clearly enough, you know.

Q. I will ask you to state what this indicates here where it is marked "vat."

A. That is the vat he was supposed to counter-sink down into the wharf.

Q. Was that vat to go into the building or outside of the building?

A. The vat was to go outside of the building.

Q. Did you give Mr. Godo any instructions in reference to the placing of that tank and making measurements for it? [192—132]

A. I had the tank there; it was too long. I told Mr. Godo to take up this plank, get a peevy and take up that plank, and find the girder there and take the measurements from that girder, and cut down the tank to fit it.

Q. Did you show him the plank you wanted him to take up? A. Yes, sir.

Q. Were you standing there close to the plank?

A. Yes, standing very close by when I told him to take up the plank.

Q. Did you at any time tell him not to take up the plank or Tom would give him hell? A. No, sir.

Q. Did you ever make any similar remark of that kind to him? A. No, sir.

(Testimony of Peter D. Cornils.)

Q. Did you ever indicate to him he was not to take up the plank? A. No, sir.

Q. Did you know that he was going under the glue-house to attempt to make the measurements for that tank? A. No, I did not.

Q. Did you ever direct him to go under the glue-house or wharf? A. No, sir.

Thereupon the blue-print heretofore referred to as Identification 5 is offered in evidence by Mr. Evans, received in evidence by the Court and marked as Defendant's Exhibit 5.

Q. What does this space here towards the center of the map indicate?

A. The center is the foundation of the top floor line, and [193—133] the dotted line is the measurements of the bottom of the ringer.

Q. Ringer foundation? A. Yes.

Q. How far is that from the elevator?

A. Between 18 and 20 feet.

Q. Did you ever know of any of the men using the space between the counter-weight guides to discharge water? A. No, sir.

Q. You testified as to the time the ringer foundation was put in. When was that?

A. It was in April, 1911.

Q. I will call your attention to Defendant's Exhibit 4, and call your attention to those spaces between these timbers, the timber marked 4 and the timber with the 2X on it; is that a correct photograph of the situation at the time Godo was hurt?

A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. Was there any boards on there? A. No sir.

Q. What space is there between this timber marked X and the timber marked XX?

A. Three feet and two inches.

Q. What have you to say as to the conditions under the packing-house, whether there were any obstructions aside from the elevator and counter-weights, ringer tank and ringer foundation? A. What?

Q. Were there any obstructions, was it open or not? A. It was all open. [194—134]

Q. Was there anything to hinder Godo if he desired to go under there from going through this space marked 4 and around in safety?

A. Not a bit of it.

Q. Was that open and apparent so that he could see it?

A. Yes, sir. He run right straight in against it.

Q. Were you there when the glue-house was built?

A. Yes, sir.

Q. State whether or not there was any space between the foundation and the mudsill and mud.

A. No, sir. At the time we were building it there was a space, but it had been filled up and the sills were in the mud at the present time.

Q. So that there was a solid foundation from the glue-house down to the mud? A. Yes, sir.

Q. I will show you Defendant's Identification 6 and ask you what that picture shows at the place the picture of the man appears.

A. It shows over there the lay of the sill, which is supporting the joist of the walls.

(Testimony of Peter D. Cornils.)

Q. Is this the foundation of the glue-house?

A. This is the foundation of the glue-house.

Q. Is that location where your picture appears there opposite where the tank is sunk in on the outside?

A. Yes, the tank is right there on the outside.

Thereupon said Identification 6 is offered in evidence by the defendant, received in evidence by the Court and marked as Defendant's Exhibit 6.
[195—135]

Q. I show you Defendant's Identification No. 7 and ask you what that is.

A. That is a front view of the glue-house, of the new addition.

Q. The new addition? A. Yes, sir.

Q. When was that constructed, the new addition?

A. It was constructed the latter part of April.

Q. In April? A. Yes, sir.

Q. 1911? A. Latter part of April.

Thereupon said identification is offered in evidence by the defendant, received in evidence by the Court and marked as Defendant's Exhibit Number 7.

Q. I show you Defendant's Identification No. 8 and call your attention to the trough. State what that was.

A. It was an old feed trough that they took in there at the time before they put down the foundation for the ringer, to put the water in, leading the water away from the foundation so that they could finish the foundation.

Q. Were you familiar with the location of that

(Testimony of Peter D. Cornils.)

trough when it was put in there? A. What?

Q. Were you familiar with the location of it under there?

A. Well, I did not pay close enough attention, only I know in what condition the ringer was standing at the time of the accident.

Q. The ringer?

A. I mean the trough, at the accident. [196—136]

Q. At the time of the accident? A. Yes.

Q. I will ask you whether or not that trough was placed there between the uprights that the counter-weights ran in. A. It could not.

The COURT.—Which accident, at the time the cable broke or at the time the man got hurt?

Mr. EVANS.—I am simply asking at the time the man got hurt.

Q. At any time or at the time Godo got hurt was this counter-weight or this trough there between the uprights where the counter-weights ran?

A. No, sir.

Q. At the time the ringer foundation was constructed did it run through there?

A. I haven't noticed it.

Q. Were you under there?

A. I have been in there from the time—no, not directly under through there—I generally look down from the top after I cut the hole out in the floor.

Q. If the trough was put through there on top of the mudsill between the guides or upright pieces that the counter-weights worked on, would the counter-weight if it had been changed have come down and

(Testimony of Peter D. Cornils.)

crushed that? A. Yes.

Q. Had the counter-weight been changed at the time the ringer foundation was put in?

A. No, sir; not to my knowledge.

Q. I say had the counter-weight been broken and been repaired at the time the ringer foundation was put in? A. No, sir. [197—137]

Q. It had not?

A. It had been repaired before in January.

Q. That is what I asked you?

A. I misunderstood you.

Q. The counter-weight cable broke in January?

A. Yes.

Q. And the ringer foundation was put in when?

A. In April.

Mr. EVANS.—We offer this in evidence, Identification 8.

Mr. TEATS.—I wish to cross-examine him.

The COURT.—Proceed.

(By Mr. TEATS.)

Q. You don't know where that box was when they were shipping the mud and stuff out of this hole for the ringer foundation?

A. I know where the box was; yes.

Q. You did not see where it was while they were dipping out the water?

A. I know where the box was, but I did not see where that end led to.

Q. You did not know where the end led to?

A. No, sir.

Q. So that you don't know whether this shows

(Testimony of Peter D. Cornils.)

where the box went to or not?

A. It shows exactly the box situated in the position the way I seen it, but I did not see that end because I looked from the top down.

Q. You did not see it while they were at work?

A. Yes.

Q. Would you say it was in that position? [198—138]

A. The laborers on the glue-house poured the water out of that hole there in order to prepare for the foundation.

Q. That was the position it was in?

A. That was the position it was in at the time they were using it.

Q. Never been changed?

A. Not to my knowledge.

Q. It might have been in a different position over this way at that time?

A. Might have been over there. I could not swear to it.

Q. So that that might have stuck over this way?

A. It could not be stuck in between the guides.

Q. It might have been stuck over this way?

A. There is no room for it there; it could not pass through any other way there. That trough is 14 inches wide and that would not have room to go out there.

Q. That trough might have stuck along here?

A. No, sir; it was not on this side of these posts there; it was over on the other side of that row of posts.

(Testimony of Peter D. Cornils.)

Q. What posts are these?

A. These are three posts that support the girder of the main post leading up to the second floor.

Q. What is this place over here?

A. That is the elevator-shaft.

Mr. TEATS.—We haven't any objection to this.

Thereupon said Identification 8 is received in evidence by the Court and marked as Defendant's Exhibit 8.

(By Mr. TEATS.)

Q. To make it a little plainer to the jury, this space right [199—139] here is the elevator-shaft?

A. Part of the elevator-shaft.

Q. We will call it "el"? A. All right.

Q. And these posts?

A. That is a post and there is a post and there is a post (indicating). Here is one going straight up; you can see the grain of the wood going up.

Q. Ps for posts? (Marking on exhibit.)

A. Yes, sir.

(By Mr. EVANS.)

Q. Mr. Cornils, since the repairing of the cable in January, 1911, down to the time of the accident, to Godo, had there been any change in the cable?

A. No, sir.

Q. Did you see Godo immediately after he was injured? A. Yes, sir.

Q. Did you have any conversation with him?

A. I did not hear—

Q. Did you have any talk with him?

A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. What was said?

A. Well, nothing that amounted to—

Mr. TEATS.—Whereabouts?

A. With Godo immediately after he was injured.

Mr. TEATS.—I object to that. The evidence shows so far Godo was not in a condition to be talked to and could not understand what was said, and a conversation with a dead man is immaterial.

The COURT.—That is one of the questions in the case, and goes [200—140] to the weight of the evidence and not to its admissibility. Objection overruled.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. What was said between you and Godo, if anything?

A. Well, I stepped up there; my first impression was, I said, “For God’s sake! What did you go under there for? Why didn’t you take up the plank as I told you?”

Mr. TEATS.—We object to that, that is not any expression, it is not an expression of Godo’s it is not an admission, it is only his own self-serving proposition and we object to it and move to strike it from the record.

The COURT.—Objection overruled. Motion denied.

Mr. TEATS.—Save an exception.

The COURT.—Exception allowed.

Q. What did Godo say?

A. He said, as much as I understood it, I do not

(Testimony of Peter D. Cornils.)

know why I did it.

Q. He said something to you?

A. That is the expression I understood from him, I do not know why I did.

Q. I think I asked you, you superintended the building of the glue-house originally? You were there and superintended the original construction of the glue-house? A. Yes, sir.

Q. You knew the foundation went clear down to the mud? A. Yes, sir.

A JUROR.—I would like to know the size of this drum this coil was taken off of.

Mr. EVANS.—Q. What was the size of the drum up above that the [201—141] coil was taken off of? A. Thirty inches in diameter.

Q. How much was the counter-weight let down from where it had been?

A. The counter-weight was let down I should judge from 33 to 34 inches.

Q. What was the diameter of the drum?

A. I should judge about thirty inches.

Q. What was the condition under the glue-house?

A. All mud.

Q. All muddy? A. Yes.

Q. Was there any difference from one spot to another, appreciable?

A. Some place maybe was a little less, and other places go up to the hip in it.

Q. How long was the wind you took off?

A. I should judge you take three times three, 14, 9. 42. That is about the size of it.

(Testimony of Peter D. Cornils.)

Q. How much?

A. 9.14 feet. No, 30 inches, it would be 94 inches and two-tenths.

Q. That you actually took off?

A. 94.2 would be about it, if you figure it.

Q. The weight was actually let down about how far? A. About 33 to 34 inches.

Q. That is the actual measurement there?

A. That is the actual measurement of what the counter-weight was, lower than it was put before.
[202—142]

Cross-examination.

(By Mr. TEATS.)

Q. You are a brother in law of Carstens?

A. So I am, yes.

Q. You have been master mechanic there for the last eleven years? A. Nine years, I figure.

Q. Since 1903? A. 1903.

Q. You have charge of the men in the mechanical part of it? A. Yes, sir.

Q. And if there is a dangerous way, any danger of any machinery, it is your duty to see that it is made safe? A. That is for me to look after, yes.

Q. If there is any danger after you have repaired a machine making it more dangerous than before, it is your duty to see that it is remedied?

A. Yes, sir.

Q. So that in this case if Godo went under there at your direction, it was your duty to notify him of the change in the cable wasn't it?

Mr. EVANS.—We object to that.

(Testimony of Peter D. Cornils.)

A. He did not get any orders from me.

Mr. EVANS.—We object to that as not proper cross-examination, argumentative, immaterial and calling for a conclusion of law.

The COURT.—Objection sustained.

Q. How many times during the last several years have you been under this glue-house?

A. I could not tell you the times. [203—143]

Q. As a general thing you don't go under there?

A. Yes, sir, anywhere where the men go I go.

Q. But as a rule you send the men under there?

A. No, sir, I am always going under myself first.

Q. First? A. Yes, sir.

Q. You did not go under there first when they fixed the foundation did you? A. Yes, sir.

Q. Were you under there during that time?

A. I was right under there, yes, sir.

Q. I thought you said you looked down through the hole?

A. I took *an* investigated the ground and then I gave the order to cut out the hole through the floor first for them to get light in order to see what they were doing down in the dark hole.

Q. You say that you went in there first?

A. Yes, sir.

Q. Which way did you go in?

A. I came in, I did go in through the small hole in the middle span of the building, on the west side of the building.

Q. In the small hole? A. Yes, sir.

Q. Under the platform?

(Testimony of Peter D. Cornils.)

A. Under the platform.

Q. And was there any other way of going in there at that time? A. Not at that time.

Q. Now at that time there was just a platform when they were [204—144] putting in this concrete form?

A. Only the porch platform there, yes, sir.

Q. Now you say that that was maybe put in there about the middle of April? A. Yes, sir.

Q. About the middle of April, that would be about the 15th, somewhere along there?

A. Somewheres in the neighborhood, yes, sir.

Q. And from that to the 20th, somewhere along there.

A. I doubt if it was that long, I think it was put in in the neighborhood of the 15th or 16th, more so than about the 20th.

Q. More likely the 15th or 16th than it was the 20th? A. Yes, sir.

Q. You at that time had not commenced building the new addition to the glue-house? A. No, sir.

Q. Now, at that time you were building the big shed over the wool-pulling machines and trough, weren't you?

A. That shed was put up already, it was up already before that.

Q. Now, did you employ Mr. Carroll, one of the men who testified here?

A. Yes, sir, he was one of the laborers.

Q. One of the laborers? A. Yes, sir.

(Testimony of Peter D. Cornils.)

Q. And he went to work there about the 12th of April, didn't he?

A. I would not tell you what date, I do not know sure, but it did not go back that far. [205—145]

Q. But he went to work on the big shed?

A. We built the shed first before we went on that foundation.

Q. He first went to work on the big shed?

A. I could not tell you whether he went on the shed or any other place else. I had a good deal of other work to look after.

Q. You had all the other matters and did not see where he went to work. Do you know when you finished the shed?

A. I could not tell you exactly that time neither.

Q. About when?

A. I know that shed was built at the time when I was giving instructions to cut down the tank, because I was standing by one of the planks supporting that shed and took up that plank.

Q. That is the 27th of May?

A. The 27th of May. I do not know exactly, At the time when that shed was being put up.

Q. You could not swear to that? A. No, sir.

Q. You do not know whether that shed was put up before or after the foundation for the ringer was put in?

A. I could not swear to it exactly, no, sir. It might have been before that, I could not swear to it.

Q. Now, do you say that addition to the glue-house was made in April?

(Testimony of Peter D. Cornils.)

A. In the latter part of April it was started.

Q. Started in the latter part of April? A. Yes.

Q. And was it completed, when was it completed?

A. Oh, that was quite a little time. We did not have the men [206—146] at it steady all the time. They were off and on at it. Always take men off and on at different kinds of work.

Q. Different kind of work? A. Yes.

Q. And you do not know when that was completed?

A. No, sir, I could not tell.

Q. Was it completed when Godo got hurt?

A. No, I do not think it was.

Q. Mr. Cornils, when did you see those guides where you say that it shows that the weights came down below the floor?

A. When did I see those guides?

Q. Yes.

A. I seen the guides there from the time they were constructed and put in there.

Q. When did you last see them?

A. I seen them when that building was started in 1906 when the people from Seattle put them in there.

Q. You have seen them guides off and on all the time up to when?

A. I have seen the guides there all the time whenever I have been under that building.

Q. Whenever you were under that building?

A. Yes, sir.

Q. Now, were you ever under that building to the west of the elevator well?

A. I have been under there and all the places.

(Testimony of Peter D. Cornils.)

Q. Have you been in under there? A. Yes, sir.

Q. What for?

Mr. EVANS.—We object to that. [207—147]

A. I have been there to the shaft; sometimes I have been over there to the glue-house floor.

Q. When were you out there to the west of the elevator well? A. To the west of the elevator well?

Q. Yes.

A. Just went just underneath the porch, that is all.

Q. Just underneath the platform? A. Yes, sir.

Q. Now, when were you under there?

A. I could not tell.

Q. Never was under there, were you?

A. I have been there many times, I haven't any idea.

Q. Many a time? A. Might be many a time.

Q. When?

A. I could not tell you because there are too many times for me to go under there.

Q. What way would you get in there?

A. It all depends. Sometimes there was timber right in there which was smashed up, and I seen that the guidepost was hanging under it and did not have any support, and that was the last time I went in there and investigated this guide-post and steadied them up.

Q. When was that?

A. That was after the cable was broke.

Q. After the cable was broke? A. Yes.

Q. And after that time you never were down there? A. Oh, I might have been down there.

(Testimony of Peter D. Cornils.)

Q. But you never were in there at that place at that time? [208—148]

A. Not any particular reason for it, I don't think.

Q. Now, you are quite sure the guide showed it was worn? A. What?

Q. You are sure the guide showed it was worn down below the floor?

A. No, sir; it did not show anywhere down below.

Q. It don't show anywhere down below the floor?

A. No, sir.

Q. I thought you said the guide showed a wear below the floor?

A. No, sir; I was up on the top floor where you can see the whitewash mark on the guides. The cable never been any higher than that. And you take from that mark down to the present position of the elevator and you can see between 30 and 34 inches.

Q. So that I was mistaken when I understood you to say that the guide down below the floor showed it had been worn down below?

A. No, sir, that was not my expression.

Q. Then you never saw the weight come down below the floor as a matter of fact?

A. Yes, sir; I seen the weight below the floor from 16 to 18 inches.

Q. When?

A. Whenever I been there and the weight was there.

Q. There is nothing there on the guide to show it wore there.

(Testimony of Peter D. Cornils.)

A. Did not need to be. I have seen the guide below the floor.

Q. Then the other men who stated it did not go down below [209—149] the floor are mistaken?

A. They are mistaken, I should say so.

Q. You say the cable broke in January?

A. January 16th or 17th, and it was repaired.

Q. Between the 16th and the 17th? A. Yes, sir.

Q. What makes you think it was between the 16th and 17th?

A. Because I have been investigating the time-book.

Q. Now, you don't know from your own memory?

A. Because I have got too much other things to think of, and I was only going by the time-book.

Q. From your memory you do not know but what it might have been broke some other time?

A. It could not have been.

Q. I say from your own memory?

A. All I can tell you is from the time-book I got it from.

Q. You are not testifying from what you absolutely know yourself, only from the time-book?

A. From the time-book, that is all.

Q. You did not make the time-book yourself?

A. No, I did not make the time-book myself.

Q. It is not your business? A. No, sir.

Q. So that you do not know from your own memory when that cable was broken, from your own memory? A. I only can go by the time-book.

Q. Now, after the shed had been completed across

(Testimony of Peter D. Cornils.)

this big space between the two buildings you wanted to put in a large tank? A. Yes, sir. [210—150]

Q. That is for the purpose of building a plant there for the washing and drawing of the wool, isn't it? A. Yes, sir.

Q. You were on this job when Godo got hurt. The shed had been completed?

A. The shed had been, yes.

Q. And you wanted to make the measurements for that particular vat? A. Yes, sir.

Q. You say you told him to go and get a peevy?

A. Yes, sir.

Q. When did you tell him to get a peevy?

A. I told him that the very first time when I gave him instructions to get the measurements, when he got down to the plank what he should measure. I told him to get the peevy.

Q. Whereabouts were you at that time?

A. I was standing by the post at that time where I was supposed to take up the plank.

Q. Were you supposed to take up the plank?

A. Yes, sir.

Q. Isn't it a matter of fact that when you asked him—you says, "You have got to make this measurement," better go below? A. No, sir.

Q. And he said, "Let's take up the plank"?

A. No, sir.

Q. And you says, "No, if Tom caught you at that he will give you hell, we will have the laborers do that"?

A. No, sir, nothing of the kind. [211—151]

(Testimony of Peter D. Cornils.)

Q. You have a lot of laborers around there working? A. Yes, sir.

Q. And you have them do the work that a laborer, a common laborer, can do? A. Yes, sir.

Q. And whenever there is a job for a common laborer you see that a common laboring man does that?

A. Yes, sir.

Q. To save expense? A. Yes, sir.

Q. And that was a common labor job to take that plank off, wasn't it? A. Yes, sir.

Q. Then when this fellow got hurt you say that you went to him and said, "Why didn't you do as I told you to, take up that plank?" A. Yes, sir.

Q. Now, when that occurred that was immediately after they had drawn him out of that building?

A. I do not know. He was sitting on the porch at that time.

Q. Didn't you see them drawing him out of the building? A. No, sir.

Q. He was bleeding from the nose?

A. He was sitting at the wharf at that time.

Q. He was bleeding at the nose?

A. I did not see him bleeding at the nose.

Q. He was suffering, was he?

A. He might suffer.

Q. He was groaning aloud?

A. He was groaning, yes, sir. [212—152]

Q. And then you say that he said at that time that he forgot?

A. The way I understood him, "I do not know why I did it."

(Testimony of Peter D. Cornils.)

Q. Now, as a matter of fact you never spoke to him like that at all and he never made any reply to you, did he? A. He made that reply to me.

Q. And as a matter of fact, sir, you had a release, trying to make him sign a release *realizing* the company from damage?

A. I never thought anything at all about it; it just slipped out of my mouth involuntarily, without thinking what I was saying.

Q. Didn't you have a release?

A. I don't know I had a release with me or not.

Q. Didn't you have a release Alstrum brought over there? A. Sir?

Q. Didn't you have a paper for him to sign that Alstrum brought over?

A. I do not know Alstrum ever had a paper there for him to sign.

Q. Didn't he give it to you and didn't you try to get him to sign that release right there?

A. Not as I—

Q. And the foreman said go away, he is too sick a man to talk to? A. Not that I can remember.

Q. Don't you remember that? A. No, sir.

Q. As a matter of fact that is true, isn't it?

A. No, sir, not as I know.

Q. And you had the release for him to sign, didn't you?

A. I never had one, I never talked about a release.

[213—153]

Q. Charlie Lundgren pushed you away and said he is too sick a man, didn't he?

(Testimony of Peter D. Cornils.)

A. I don't remember he ever said anything of the kind.

Q. If that had occurred, would you have remembered it? A. I might have.

Q. But you do not remember it now?

A. I don't remember it, no.

Q. Those are your instructions, are they not, when a man gets hurt?

A. No, sir, I have not any instructions along that line.

(By Mr. EVANS.)

Q. Mr. Cornils, how long would it have taken Godo to have taken his peevy and taken up that plank to get the measurement you wanted?

Mr. TEATS.—I object to that as immaterial.

(Objection overruled and exception allowed.)

Q. How long would it have taken to raise that plank up?

A. Probably would have taken maybe two or three minutes, all depending on how the plank was tightened down.

(Recess, after which the call being waived and the jury being present, the trial hereof is continued as follows:)

Mr. CORNILS, being recalled, continues his testimony as follows:

Cross-examination.

(By Mr. TEATS.)

Q. Was the elevator repaired during the month of April? A. No, sir. [214—154]

Q. Wasn't it out of order during the month of

(Testimony of Peter D. Cornils.)

April and needed repairs?

Mr. EVANS.—That is objected to, and we move to strike it out because there is no complaint of it ever being out of repair at all.

The COURT.—Objection sustained.

Q. Was the time when the cable broke the only time the elevator was broken down during the year, from January to the time of the accident?

Mr. EVANS.—We object to that as immaterial.

A. What do you mean?

The COURT.—Objection sustained.

Q. Was the breaking of this cable the only time?

The COURT.—State the time you are speaking of.

Mr. TEATS.—From January to May?

A. That is the only time I know it was broken down.

Mr. EVANS.—I withdraw the objection. If you confine it to the breaking of the cable it is all right.

Q. This breaking of the cable was the only time that the elevator got out of repair during January, March, April and May?

Mr. EVANS.—We object to the question.

The COURT.—Objection sustained.

Q. Was the breaking of the cable the only time, the only time the elevator got out of repair from January to May?

Mr. EVANS.—We object to that.

The COURT.—That is the same question. Objection will be sustained.

Q. I will ask it in another way. Was the cable out

(Testimony of Peter D. Cornils.)
of [215—155] repair during January, February,
March or April?

Mr. FLETCHER.—That is objectionable.

The COURT.—Objection sustained.

Mr. TEATS.—Exception.

The COURT.—Exception allowed.

(Witness excused.) [216—156]

[Testimony of H. B. Clark, for Defendant.]

H. B. CLARK, a witness called for and on behalf
of the defendant, being duly sworn, testified as fol-
lows:

Direct Examination.

(By Mr. FLETCHER.)

Q. State your name. A. H. B. Clark.

Q. And where are you employed now?

A. John B. Stevens Company.

Q. You were formerly in the employ of the Cars-
tens Packing Company? A. Yes, sir.

Q. How long?

A. Three years, practically three years.

Q. And when did you leave their employ?

A. The 11th of November last year, latter part of
October of last year.

Q. Now, were you there in the glue-house in May
1911, when Louis Godo got hurt? A. Yes.

Q. Whereabouts were you?

A. On the top floor.

Q. I will ask you how you heard of his getting
hurt?

A. There is a question I cannot answer exactly. I
either heard Louis, as we called him—I never knew

(Testimony of H. B. Clark.)

his last name—groaning down below or the man beside me heard him. At any rate as soon as we heard him we rushed to the elevator and rushed down. Whether I heard him groaning or whether someone else, I do not know.

Q. You got down there very soon? [217—157]

A. Immediately.

Q. Mr. Clark, I will ask you if Peter Cornils was there? A. Yes, sir.

Q. I will ask you whether you heard any conversation or remark made by Cornils to Godo at that time? A. I did.

Q. What was it?

A. As near as I can remember Mr. Cornils explained to Godo something like this: "What in the world were you doing under there?" or you had no business there, something to that effect.

Q. Do you recall what if anything Godo said in reply? A. Why, I do not.

Q. You do not pretend to repeat the exact words of the exclamation? A. No, sir.

Q. That is the substance so far as you are able to recall it? A. Yes, sir.

Q. I do not know this is a matter for us to go into, but it has been brought out. Did you see anybody there, Mr. Clark, Alstrum or anybody with any paper that purported to be a release or any paper that they wanted Godo to sign? A. No.

Q. Did you ever hear of any such circumstances?

A. I never heard of such a thing, no.

(Testimony of H. B. Clark.)

Cross-examination.

(By Mr. TEATS.)

Q. Who were there besides you?

A. Well, that is something I cannot answer. I can recall Mr. [218—158] Cornils, and I would not try to state who else was there.

Q. Could you name anybody else?

A. No, not with any definiteness at all; not to be sure of it myself.

Q. You do not know whether there were any men around there?

A. Oh, yes, there were probably 20 other men there.

Q. But you did not know anybody but Cornils?

A. That is a guess.

Q. And that is a guess?

A. I say the number twenty is a guess.

Q. That is what I say, that is a guess?

A. That is a guess.

Q. And who was there first?

A. I cannot answer.

Q. Where was Godo when you got down there on the wharf?

A. Just being pulled out from under the building, just as he was pulled out from under the building.

Q. Could he walk, did he walk? A. No.

Q. Laid down on some planks there?

A. He was laying on the ground or planks, on the planking there as I came down.

Q. Where did this conversation occur, just as they took him out from under the building?

(Testimony of H. B. Clark.)

A. As he laid there on the planks.

Q. He laid there on the planks? A. Yes.

Q. He was not sitting?

A. I would not try to recall that.

Q. You think he was lying on a plank. Did you notice him? [219—159] A. Not especially.

Q. Didn't notice how pale he was?

A. I would not say I did; he looked very badly to me.

Q. He looked badly bruised up? A. Yes, sir.

Q. And did he look as if he was conscious of what was going on around him?

A. Why, I would not try to answer that.

Q. Didn't look that way, did he?

A. I could not answer. He was groaning; he lay there groaning.

Q. And breathing hard?

A. I do not know anything about that.

Q. Didn't you notice it?

A. I would not try to remember it.

Q. Bleeding at his nostrils?

A. I do not recall that.

Q. But in a condition in which you would say that he would not understand what you were talking about? Did you say anything to him?

A. I could not say that.

Q. You would not say that?

A. I would simply say that he was very badly hurt. I have no way of answering your further question.

Q. You did not hear him say anything?

(Testimony of H. B. Clark.)

A. I do not recall it now.

Q. And you were close up?

A. Oh, yes, 10 or 15 feet.

Mr. FLETCHER.—Q. Do you know the names of the men working around the plant? [220—160]

A. Practically all the carpenters.

Q. But you cannot recall anybody that would be there?

A. I would not try. I think I can but I would not care to try.

Mr. TEATS.—Q. Did you see Dave Alstrum come up?

A. Well, I could not answer that. Dave always did—

Q. Were you there when the cab came after him?

A. I could not answer that. I was on the plant, but whether I stayed there or not I do not remember.

Q. You do not remember whether you were there when the cab came after him?

A. No, I do not recall it.

Q. Do you know who put him in the cab?

A. No, I could not.

(Witness excused.) [221—161]

[Testimony of David N. Allstrum, for Defendant.]

DAVID N. ALLSTRUM, a witness called and sworn on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. FLETCHER.)

Q. Your name is David N. Allstrum?

(Testimony of David N. Allstrum.)

A. Yes, sir.

Q. What business are you in?

Q. Printing business, just now.

Q. You were formerly with Carstens Packing Company? A. Yes.

Q. When did you leave their employ?

A. The first of November, last year.

Q. You were in their employ in May, 1911?

A. Yes, I was.

Q. Mr. Allstrum, I show you several identifications here and I will ask you if you had them taken and were with the photographer when they were taken?

A. Yes, I was along when these were taken.

Q. Was Mr. Cornils with you?

A. Well, he appears in one or two of these photographs.

Q. Is that he in Exhibit 8?

A. Yes, that is Mr. Cornils.

Q. And again in Exhibit 6?

A. Yes, that is Mr. Cornils.

Q. Who is this in Exhibit 3?

A. That is myself.

Q. Do you recognize the space around under the floor of the glue-house, had you been under there prior to Mr. Godo's injuries?

A. Well, I had been there when the building was put up. I [222—162] do not recall I had been under there prior to the injury.

Q. Well, from the time it was put up to the time of his injuries, and the time these pictures were

(Testimony of David N. Allstrum.)

taken, I will ask you if you recall if there was any lowering of the floor of the glue-house?

A. The floor of the glue-house, the floor part was above the tide-flats, and the floor had not been lowered from the way it was built in the first place. The floor itself had not been lowered.

Q. About what space was there under the glue-house from the mud up to the floor?

A. I think it was less than, I think it was something less than six feet, because I had to stoop to go in there. It varied a great deal because in some places it was probably only two or three feet, while at other places it was higher.

Q. In going to the position where you were, around the different parts of the building from the outside of the building, how did you get into the position where you are in the exhibit?

A. Well, I could have gotten in, crawled in there.

Q. In Exhibit 1, the opening, the only opening that is shown under the building?

A. Yes, that is one opening there, right in there, and I could have crawled in here (indicating on picture).

Q. That is—

A. This is the new part of the building. This was built after the old plant; this was built later than the old part here. This part of the plant here was the new part. It was built since this part of the plant was built. [223—163] This part here as it stands out there is this part here, that corner over there is this corner here. (Witness compares two photo-

(Testimony of David N. Allstrum.)

graphs, exhibits in this case.) I could have crawled in there, which would be here, or here, which would be over there; I could crawl in there and go around or go that way from this side.

(Witness indicates and illustrates by comparing two photographs.)

Q. If you crawled in the space where you marked the one, how would you get to the position where you are shown on Exhibit 1?

A. I would go right through there, which would bring me in here and cross the beam there and get over (indicating on photograph).

Q. Suppose you had gone in back of the building?

A. I would go in on the other side of the beam, on that side of the beam (illustrating on photograph).

Q. If you had gone in the space on Exhibit 7 you speak of, you would not get anywhere near the counter-weight?

A. No, no, unless I would have crossed this beam here, but there would have been nothing gained, because there is an open space over here right in around where the elevator was.

Q. In Exhibit 8? A. There is an open space.

Q. All that space is open?

A. All that space is open.

Q. And if you had entered from the rear?

A. If I had entered from this side, yes.

Q. You would have gone right back to where Cornils is over [224—164] there without interfering with the elevator?

(Testimony of David N. Allstrum.)

A. Yes, if I had gone through there; yes.

Q. That is what I say, in Exhibit 7. Do you know when these photographs were taken?

A. I am not *sure the* exact date. I could tell by examining the records in the office, because we would have a file of that bill from the photographer that would show.

Q. I will ask you whether or not it was shortly after the suit was brought.

A. Oh, yes, I am not sure as to that; maybe it is before the suit is brought; I am not sure about that; I would not say for sure; I would not say for sure.

Q. This Exhibit 4 shows an opening marked B to the left of the elevator shaft and an opening marked B to the right. Did you ever know of those openings having been closed before Mr. Godo got hurt?

A. I do not think so.

Q. Did you ever know of any changes in these openings on either side?

A. No, sir; I am satisfied not, for the reason I believe these openings were left open on purpose so that all the men when they were putting in the counter-shaft could work around there. Otherwise they would have to have gone here to get on the inside of it. I believe those were left open on purpose.

Q. Do you recall any planking filling up this space just above the beam where figure 4 is marked on that photo?

A. Not particularly. There may have been some boards in there. If I recall right there were some

(Testimony of David N. Allstrum.)

boards in there on which we stood— [225—165]

Q. No, I mean closing up the space, planking up and down?

A. Oh, no, that was never filled up. I think that is a new part of the building.

Q. The opening, figure 4, and further out you think it is in the new part of the building?

A. I think it is. I am satisfied it is, because this elevator was constructed in the west end of the building and the addition was put on the west end.

Q. Do you recall ever noticing the counter-weights prior to Mr. Godo's injury as to whether or not they came below the floor of the glue-house, or whether you know anything about that?

A. You call the floor of the glue-house—

Q. Yes?

A. This is really the floor of the glue-house. This would not be considered the floor.

Q. No, this is ground, mud, but the floor is up above as you suggest? A. What is that question?

Q. I ask you whether or not you observed the counter-weights, as to whether or not they came below the floor prior to Godo's accident?

A. I could not say.

Q. Do you recall the breaking of the counter-weight cable, do you remember anything about that, and having it tied again?

A. No, I do not; not at the time it was broke. I was told about it afterwards.

Q. You do not know anything about that of your own knowledge? [226—166] A. No.

(Testimony of David N. Allstrum.)

Q. That was not in your department anyway?

A. No.

Q. I will ask you if you recall the date that Mr. Godo got hurt, the fact he did get hurt?

A. Well, I knew he got hurt, but I could not say now what the date was.

Q. I think it is agreed it was May 27th, 1911. Do you know how long after he was hurt before you saw him?

A. Well, I called on him once while he was up in the hospital.

Q. Do you remember seeing him at the packing-house before he was taken to the hospital?

A. Oh, yes; I saw him directly after he was injured.

Q. I will ask you if at that time you or anyone else presented any paper to him in the shape of a release or otherwise, with the request to have him sign the release or any paper at all?

A. No, sir; I did not.

Q. Did you ever hear of any such occurrence before?

A. No, sir; I never knew of any such thing.

Cross-examination.

(By Mr. TEATS.)

Q. At that time you held what position over there?

A. Assistant treasurer.

Q. And your work was in the office?

A. It was in the office, and the work also took me outside of the plant.

Q. How much outside of the plant?

(Testimony of David N. Allstrum.)

A. Well, whenever the occasion required. [227—167]

Q. And what sort of an occasion required the assistant treasurer to go outside?

A. Well, I had charge of the insurance, both fire and liability, so that whenever anyone was hurt it was reported to me at once and I investigated it.

Q. The fire, what did you have to do—

A. I simply mentioned the fire. I said insurance, and I described that by saying fire or liability.

Q. And if one of them was hurt you investigated it on account of your liability? A. Yes, sir.

Q. Casualty insurance?

A. Well, pardon me—there was no casualty insurance; we had none.

Q. You had none at that time? A. No, sir.

Q. Then you did not have any occasion to investigate it?

A. Oh, yes, we always investigate all accidents anyway.

Q. And at that time you were carrying your own liability?

Mr. EVANS.—We object to that as immaterial.

The COURT.—The objection is sustained and the jury is instructed to disregard all the witness has said concerning insurance in any way.

Q. So when a person was injured when you were there during May or during any period of time prior to this accident, your duty was to investigate the cause and so on? A. Yes.

Q. And make your reports?

(Testimony of David N. Allstrum.)

A. I always kept a report of it.

Q. And that was part of your duty? [228—168]

A. Yes, sir.

Q. But there was nothing in your duty that would call you under the glue-shed without something particularly happened?

A. Not unless there was some occasion for me going there, not outside of my duties.

Q. I see, but were you ever under the glue-house?

A. I was, yes.

Q. I mean before this accident?

A. I could not say that I was. I was probably. I was around there all the time when this place was built, and probably—

Q. That was built in 1906?

A. Yes, whatever year that was.

Q. And since that time you have not been under it?

A. I do not think I ever was under.

Q. So that when you stated that there were openings down below there you did not know whether they were openings at all down below there, up to the time you went in there to take these photographs to introduce in this case, did you?

A. Yes, I did. I will show you. This, as I said before—

Q. What exhibit is that?

A. That is exhibit Number 3. This a new part of the plant. This is here, over here at the west. That is the new part of the plant, and these beams were not there when the glue-house was built, they were simply put there after the new addition was put

(Testimony of David N. Allstrum.)

in there, after the glue-house had been turned into a tannery, and that was done afterwards.

Q. Was there anything out there on the west side of the house, the old glue-house?

A. Well, there was a wharf. [229—169]

Q. That is the wharf, that is down here along the railroad track (indicating on plat)? A. Yes, sir.

Q. Where that floor is? A. Yes, sir.

Q. Was there anything else there?

A. Well, they used to store different things as I remember.

Q. When?

A. Out in front there, store hay and stuff of that kind.

Q. On the wharf? A. On the wharf, yes.

Q. Was there anything else there except the wharf?

A. I do not recall that there was, no. Any other building, you mean?

Q. Yes, or anything else built under the structure?

A. Well, there was a runway from the door to the center of the house here, a run or incline runway.

Q. Inclined runway, which way did the incline run?

A. West, down towards the railroad tracks.

Q. That is all there was there? A. Yes.

Q. Now, what is the space between those posts (indicating on the photographs)?

A. I cannot say in feet and inches, but when we were down there taking the photograph I walked

(Testimony of David N. Allstrum.)

through that, and this space here was larger than this space here.

Mr. FLETCHER.—So that the record may show the space on the left of the elevator weight was a little larger than the space on the right?

A. Yes, as you were facing it, it would be left, yes.
[230—170]

Mr. TEATS.—Q. How much larger?

A. I could not say exactly, but I could probably—well, I walked through here without any trouble. I do not know I attempted to walk through there or not.

Q. You could not get through, could you?

A. I am not sure, I cannot say, but I know the space here, I walked through it on purpose to see if I could get through.

Q. But you are a slender man?

A. I did not walk through sideways.

Q. You did not walk through the other way, square to it, did you? A. It seems to me I did.

Q. You did? A. Yes.

Q. Now, Mr. Allstrum, you had to go sideways to get through, didn't you?

A. No, I don't remember I had.

Q. How far are you between the shoulders?

A. I do not know.

Q. You are about 16 inches anyway, aren't you?

A. Yes, I guess I am; is that 14 inches there?

Q. Yes, sir. You could not get through there without going sideways?

A. Of course, it is a long time ago; I could not say

(Testimony of David N. Allstrum.)

for sure; I think I went through there and had no trouble going through there.

Q. You do not know what that space is left there for? A. Well, it is my—

Q. You do not know as a matter of fact from your own knowledge. [231—171]

A. I am not a carpenter, but it is my recollection it was left there to allow the men to work in there.

Q. So that when you stated to the jury that was left there for the people to go through there when they were installing them, you did not know what you were talking about, isn't that a fact?

A. No, that is not, for the reason that is what I had been told by the carpenter that was working there.

Q. What you say, then, is what you were told. As a matter of fact you do not know from your own knowledge why that is there?

A. I know from observing and by being told by people that were practical carpenters.

Q. How long were they working there?

A. Well, I could not say, probably the time it took to put in the elevator.

Q. As a matter of fact, there was a platform all the way along there that enclosed this space here so that you could not see that at all from about 1906 up to the time when they tore it down and put on that new addition, isn't that a fact? Do you remember that platform all the way along there?

A. There may have been a platform.

Q. Yes; and that platform was about six feet.

A. I did not pay any particular attention to these

(Testimony of David N. Allstrum.)

things. I had no occasion to.

Q. You are trying to testify here as to the absolute facts, and what I want to get at is whether you know what you are testifying about or not.

The COURT.—Don't shake the ruler at the witness. [232—172]

Q. So that if that platform was there during all this period of time you do not remember it?

A. Wouldn't that have been left there when they took that platform away, isn't that condition left there, wasn't that there all the time the platform was there?

Q. I do not know. I am asking you.

A. Well, I say as I said before, I was never under there until after the accident.

Q. So that you don't know anything about what was under there until after the accident?

A. I know it had been boarded up a long while, because the cobwebs and things showed it had been there, and it had not been broken off, the boards had not been broken off, so that they were left there on purpose, left open on purpose.

Q. Now, who took these photographs?

A. Avery & Potter; I do not know which one, whether it was Avery or Potter, one of the two.

Q. Avery or Potter? A. One of the two, yes.

Q. They were taken sometime in August?

A. I could not say as to that.

Q. They are what they call flashlights, aren't they?

A. They are flashlights, yes.

Q. Who is Potter?

(Testimony of David N. Allstrum.)

A. Well, they are photographers, commercial photographers, Avery & Potter.

Q. They are a firm, Avery & Potter?

A. Avery & Potter, yes.

Q. Are you the only tall, slim, good-looking man in the [233—173] office during May?

Mr. EVANS.—We object to that as immaterial.

The COURT.—Objection sustained.

Q. You say that you went out after the accident and were there when they first took him out from under the building?

A. No; I did not; when I got out there he was out on the wharf.

Q. Lying down on these planks?

A. It seems to me he was sitting on the wheelbarrow.

Q. On a wheelbarrow?

A. Either a wheelbarrow or truck, one of these flat trucks. It seems to me he was on it.

Q. Any other man employed by the company at that time who had charge of getting releases from employees?

Mr. EVANS.—We object to that as immaterial, and not proper cross-examination.

The COURT.—Objection sustained.

Mr. TEATS.—Exception.

Mr. FLETCHER.—Let him answer.

Mr. EVANS.—Go ahead; we will withdraw the objection.

The COURT.—The objection having been withdrawn, you may answer.

(Testimony of David N. Allstrum.)

A. To my knowledge, there were never any releases ever asked of anyone. I have taken affidavits.

Q. That is not the question. Was there anyone there in your office who had charge of getting releases from the men who were injured? A. No, sir.

Q. At that time, except yourself? A. No, sir.

Q. Was it you that brought out a paper for him to sign, did [234—174] you bring a paper out for him to sign at the time of the accident?

A. No, sir; I do not believe I did. I am satisfied I did not. I never had any such instructions.

Q. Were you there when the cab came for him?

A. Yes, I was.

Q. As a matter of fact, didn't you hand a paper to Mr. Cornils, and Pete went and undertook to have Godo sign it—

The WITNESS.—Oh—

Q. And Charlie Lundgren says, "Now, he is too sick to sign it"?

A. Yes, I will tell you what that was. He was sent off to the Tacoma Private Sanitarium Hospital, and we had an application card; at least, not an application card, but an identification card, and whenever anyone was sick or hurt we would write their names down there, and on the back of that card was wording something to this effect, it is a sort of identification card, and says,—“I hereby agree to abide by the rules of the Tacoma General Hospital,” giving the name of the holder. When a man goes up there for admission he has to sign that slip of paper, about that big (illustrating). That was the slip of paper that was

(Testimony of David N. Allstrum.)

sent to him to sign.

Q. And he was unable to sign it on account of being in that condition?

A. Yes. That paper was not a release at all, but simply an identification slip and intended for the purpose of identifying the applicant to the hospital.

(Witness excused.) [235—175]

**[Testimony of Peter Cornils, for Defendant
(Recalled).]**

PETER CORNILS, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Look at Defendant's Identification 3. I will ask you how wide the space is, the first space as you go under the new building next to the counter-weight?

A. You mean from the elevator up?

Q. I mean this space here. (Indicating on exhibit.) A. Sixteen inches.

Q. How wide is the one on the other side?

A. Fourteen inches.

Cross-examination.

(By Mr. TEATS.)

Q. Who made this blue-print, Exhibit 5?

A. I did.

Q. Are the spaces you have been testifying to spaces that are marked on this map? A. Yes, sir.

Q. These are the two spaces (indicating)?

A. Yes, sir.

Q. On this map you say that it is 14 inches and 12

(Testimony of Peter Cornils.)

inches. That is all?

A. One foot two and one foot four.

Q. One foot and one foot two. This one that is one foot two you say is sixteen?

A. And that is 14.

Q. And this is one foot?

A. Yes. I got it there, 16 and 14 inches. [236—176]

(Counsel refers to blue-print and figures thereon.)

Redirect Examination.

(By Mr. EVANS.)

Q. I show you Defendant's Identification 9, and ask you what that is?

A. That is a view taken, you know, from the west side towards the east, facing the elevator.

Q. Does that show the counter-weight space and the other space on the sides? A. Yes.

Q. Who made that? A. I did.

Q. Now, can you tell from your recollection and your measurements what both of those two spaces was? A. It shows right here.

Mr. TEATS.—We object to that. He has got the exhibit here that he says is correct.

The WITNESS.—So it is.

The COURT.—Objection overruled.

Q. Go ahead.

A. It shows one foot and two inches between the measurements on one side, and it shows one foot and four inches over there. It shows one foot and two inches from here, from this side of the guidepost, and one foot and four inches from here.

(Testimony of Peter Cornils.)

Q. Is that correct?

A. Just as I recall it, yes, sir. I took the measurements at that time over there.

Mr. EVANS.—We offer this in evidence. [237—177]

Thereupon said Identification No. 9 is received in evidence by the Court and marked as Defendant's Exhibit No. 9.

(By Mr. TEATS.)

Q. You took the measurement when you made the other exhibit, too, didn't you?

A. Just exactly the same thing over there.

Mr. TEATS.—No, it is not.

(Witness excused.) [238—178]

[Testimony of Charles S. Lundgren, for Defendant.]

CHARLES S. LUNDGREN, a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. State your name to the Court and jury.

A. Charles S. Lundgren.

Q. Where do you live?

A. McKinley Park Addition.

Q. What is your occupation?

A. Millwright foreman at Carstens.

Q. Employed at Carstens? A. Yes, sir.

Q. How long have you worked there?

A. It will be five years in January.

Q. You were working there at the time Mr. Godo was injured in May, 1911? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. Were you working there at the time the cable broke that the counter-weight of the elevator was attached to? A. Yes, sir.

Q. What position did you hold over there?

A. I was foreman of the carpenters.

Q. State if you can, when the cable broke and let the counter-weight down.

Mr. TEATS.—That is from your own knowledge, just from what you know and not from what somebody told you.

Q. When was it, if you know?

A. I do not know without referring to the time-book.

Q. Did you keep the time yourself?

A. I kept the time, yes, sir. [239—179]

Q. Did you make the entries in it yourself?

A. Yes, sir.

Q. I hand you this book; what is that book?

A. That is the time-book.

Q. Whose writing is it? A. Mine.

Q. You made all the entries in there?

A. Yes, sir.

Q. Can you look at the time-book and tell, from that, can you tell when the— Did you note in the time-book at the time this work was done what the different men were doing? A. Yes, sir.

Q. Were those entries made at the time the work was done? A. Yes, sir.

Q. Can you look at that time-book and tell when the repairs to the counter-weight were made, and the counter-weight was put back? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. When was it?

Mr. TEATS.—I object to that. I would like to examine the witness on the entries.

The COURT.—I will overrule the objection—you may examine.

(By Mr. TEATS.)

Q. Where did you gain the information you put upon these books? A. I kept track of them.

Q. Where did you gain the information?

A. I do not quite understand.

Q. For instance, on here it says—what is this?
[240—180]

A. Sherman.

The COURT.—Are you going into the contents of the book?

Mr. TEATS.—This goes to the rest of it.

Q. Where did you gain the information as to that?

A. I worked at that myself.

Q. That is your own time-keeping? A. Yes.

Q. You hired a man by the name of Beyers?

A. Yes, sir.

Q. Where did you get the information as to what he did?

A. Because I was overseeing him, so I knew where they were working at the time.

Q. Were you overseeing these particular two men or all of the men in the plant?

A. Overseeing the carpenters.

Q. All of the carpenters? A. Yes, sir.

Q. When would you make the entry in the book?

A. In the evenings.

(Testimony of Charles S. Lundgren.)

Q. At evenings? A. Yes, sir.

Q. And would you sometimes take that from their word or would it always be from your own observation?

A. Well, it is generally from my own observation. I knew where they were at.

Q. And then sometimes from their words?

A. Well, it would be, it might have been some instance. I do not know of any.

Mr. TEATS.—I want to look at the book, if the Court please.

Mr. EVANS.—Q. How many carpenters did you have working under [241—181] your direction?

A. Sometimes there has been up as high as twenty or twenty-three.

Q. Along in the winter of 1911 how many did you have, approximately?

A. Somewhere in the neighborhood of 20; I could not tell exactly.

Q. When was it that they made those repairs?

A. On the 16th and 17th.

Q. Of what month? A. The first of January.

Q. 1911? A. 1911, yes, sir.

Q. Who did the work?

A. Mr. Beyers and Mr. McArthur.

Q. Is that a record of their time? A. Yes, sir.

Mr. EVANS.—We offer the book, this page.

Mr. TEATS.—We object to the offer of the book, if the Court please.

The COURT.—The objection is sustained to the offer of the book.

(Testimony of Charles S. Lundgren.)

Mr. TEATS.—Q. Where in this book—

Mr. EVANS.—Wait a minute, I am not through. He sustained your objection.

Mr. EVANS.—Q. Was that cable ever broken after that to your knowledge? A. No, sir.

(Books are examined by the Court.)

Mr. EVANS.—I submit, if the Court please, that book is [242—182] decidedly a book of original entry, the book in which all the charges were made to show where the work goes. It is the very best evidence, and the notes were made on there to show at the time what these men were doing.

The COURT.—That is what I am trying to examine it for. If it is simply a time-book the objection would be sustained, because there is not anything to show except the entry.

Mr. EVANS.—Q. Did you know all the time, as you went along, what work the men were doing?

A. As far as I could.

Q. Did you say in this book the peculiar work that Beyers and the other man were doing, and does it indicate the work done on the repair of the cable?

A. Yes, sir.

Q. When did you do that, at the time?

A. I done that in the evening.

Q. On the day that they worked?

A. On the day that they worked.

Mr. EVANS.—We renew our offer, if the Court please.

(By the COURT.)

Q. Was it your custom to enter in the book the

(Testimony of Charles S. Lundgren.)

work that the particular men were engaged in, as to the time they occupied? A. Yes, sir.

The COURT.—The objection is overruled.

Thereupon said page of the time-book is received in evidence by the Court and marked as Defendant's Exhibit Number 10.

(By Mr. TEATS.)

Q. Is there any entry here that shows what kind of repair [243—183] they did on the elevator?

Mr. FLETCHER.—Q. Do you know when the ringer foundation was built?

A. It was some time in April, I think.

Q. Of that same year? A. Of that same year?

Q. Can you show that from the book?

A. Only as construction work.

Q. Take this book and see if you can find it. What is that book? A. That is a time-book.

Q. Another time-book? A. Another time-book.

Q. A record kept by you? A. Yes.

Q. Look at that book and see if you can refresh your memory and tell us when the ringer foundation was put in. Do you know what work Mr. Godo was at there at the time the ringer foundation was built?

A. Yes, sir.

Q. What was he doing?

A. I remember he put it in there.

Q. He put it in?

A. Yes, that is, he built the forms. I just have him here as "wool-puller construction."

Q. You did not keep separate track of foundation.

(Testimony of Charles S. Lundgren.)

A. No, it was all construction work. I just had it construction.

Q. Was there any other wool-pulling construction at that time? A. Yes, sir. [244—184]

Q. Building the new addition?

A. Building the new addition, yes.

Q. When was that done?

A. That was done in April.

Q. And this ringer foundation was constructed at the same time or near the same time that the other work was done? A. Yes, sir.

Q. It was all a part of the one job? A. Yes, sir.

Cross-examination.

(By Mr. TEATS.)

Q. There is nothing in this item which shows what repair they did in the elevator?

A. No, only just elevator repair.

Q. Now, have you the time of Mr. Beyers and Mr. McArthur for April and May? A. Yes, sir.

Q. Where is it?

A. It is in that book. (Referring to second book.)

Q. I will ask you whether or not they repaired the elevator more than once during January, February, March, April and May?

A. That I do not know unless I go through the time-book.

Q. You do not know only as you go through the time-book? A. No, I do not remember.

Q. The question is where is the time of Beyers and McArthur for April and May?

A. This is fertilizer repair (referring to book).

(Testimony of Charles S. Lundgren.)

Q. What do you mean by that, fertilizer repair?
[245—185]

A. Repair work done in the fertilizer plant.

Q. Is that all of April?

A. That is the beginning of April.

Q. What is that (referring to book)?

A. Repairing cooler door.

Q. Now, where they do their work on two or three jobs during the day you would not put it all in one in that book?

A. Generally kept fertilizer in the packing department, and wool-puller separate against the glue-house, and entered all of them separately.

Q. So that in this particular item of January I see you have only six and a half hours or something like that for the man on that work; what did he do the rest of the day?

A. Well, the rest of the day they were at something else.

Q. But not put in the book? A. Yes.

Q. Are they in the book?

A. I think so, if they were there.

Q. "Glue-house elevator," Exhibit 10, what is three and a half for?

A. Three and a half is the next day; half hour there and half hour there and one hour there.

Q. For what?

A. One hour for packing-house repair.

Q. Is that all one day?

A. That is all one day, down this way (indicating).

Q. That is all one day. Then where is the time

(Testimony of Charles S. Lundgren.)

from here? For instance, each one of these is just one day. Those you have shown made only one day.

A. Here is each a day there, here is Sunday. They worked one [246—186] day there, Sunday, eight hours “fertilizer,” and the next day, Monday, would be six hours “fertilizer conveyer,” and here is two hours, “fertilizer dryer.”

Q. Let me understand that. Each column of figures represents a day?

A. Yes, a day's work is in each column.

Q. Over here they worked eight hours on the fertilizer? A. Yes, sir.

Q. And the next day six hours? A. Yes, sir.

Q. On the “fertilizer” and then again five and so on? A. Yes.

Q. And the same way all the way down?

A. Yes, sir.

Q. So that if you did work here for instance six hours, what did you do the rest of the day?

A. Well, he had two hours for “fertilizer dryer,” with one underneath the same date.

Q. Now, where are the times for April and May for these two men?

A. They are in this book here. (Indicating the second book.) Do you want to know what they were doing altogether?

A. What they were doing altogether, or whether they were working in the elevator?

A. It is all here.

Q. Now, as far as you know the item in January might have been some other repair of the elevator,

(Testimony of Charles S. Lundgren.)

except the cable, as far as you know?

A. No, it could not very well have been.

Q. Why? [247—187]

A. Because it was broke down about that time of the year.

Q. Do you remember it being broken down about the latter part of April? A. No, sir.

Q. As a matter of fact it was broken down there for about half a day or a day about the latter part of April or first of May? A. No, sir.

Mr. EVANS.—That is objected to unless it is applied to the cable or counter-weight.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.

Q. You have there “wool-pulling plant,” what was that? A. That was construction work.

Q. Could you tell what it was?

A. No, just only they were put in the wool department there.

Q. Now, what is the idea of putting the work that they did there?

A. They segregated it at the office.

Q. Charged it up to the separate plants?

A. Separate departments.

Q. What does this mean here?

A. Packing company repair.

Q. What is that? A. “Fertilizer” repair.

Q. Now over here is wool-puller repair?

A. Wool-puller repair.

Q. What is the other?

A. That is wool-puller construction; it is a differ-

(Testimony of Charles S. Lundgren.)

ent amount. [248—188]

Q. Were Beyers and McArthur working there a year before this accident, that would be May, 1910?

A. I think they were.

Q. What is this? A. Wool-puller.

Q. What is that work? A. Construction work.

Q. There is nothing there to show it is construction work? A. There is down here.

Q. Down below there is, but not above?

A. They both worked together.

Q. What is this, fertilizer repair?

A. Fertilizer repair; yes.

Q. And that is on what date?

A. That is on May 27th, the week ending the 27th.

Q. The week ending May 27th? A. Yes, sir.

Mr. FLETCHER.—1912? A. 1911.

Mr. TEATS.—Q. Then what was Godo doing on that date?

A. On the 27th he was, part of the day he was working on the coffer dam and two hours at the wool-puller.

Q. That was the day he got hurt? A. Yes, sir.

Q. So that you have wool-pullers all through here, and I see the wool-puller plant had only been constructed for about sixty days, hadn't it?

A. Well, it was under construction then.

Q. Still under construction?

A. Yes, sir. [249—189]

Q. And whenever these men did any work in April and May on the wool-puller, you charged it up to the wool-puller, didn't you? A. Yes.

(Testimony of Charles S. Lundgren.)

Q. As a matter of fact, Mr. Lundgren, if they had made any repairs there on the elevator during April or May you would have charged it up to the wool-puller? A. Charged it up to the glue-house.

Q. The glue-house had been eliminated, hadn't it?

A. It had been eliminated—it would have been charged to the glue-house.

Q. So that when you made any repairs you charged everything up to the wool-puller; that is when they made any repairs on that place at that time, in April and May, you would charge everything up to the wool-puller? A. No.

Q. Doesn't that book so show?

A. If it was repair work it was charged up—

Q. To the wool-puller? A. Yes, sir.

Q. And before that it was charged up to the glue-house? A. Yes, sir.

Q. Now, they might have made these repairs in April or May and you just simply charged it up to the wool-puller, repairs to elevator?

A. No, I might have made a note of it being elevator repair.

Q. You did not make any note. You did not make any note particularly of this part of the device called the foundation, called that wool-puller construction, didn't you? [250—190] A. Yes.

Q. This whole plant was wool-puller plant at that time? A. We were changing it into a wool-puller.

Q. Changing it from a glue-house into a wool-puller because you had gone out of the glue business, isn't that a fact? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. So that you could have made repairs on the elevator there in April and May and just simply charged it up to wool-puller, couldn't you?

A. Of course it could have been done.

Mr. EVANS.—Q. You did not do it though, did you? A. Not to my knowledge I did not.

(By Mr. TEATS.)

Q. Might have done it, Mr. Lundgren; might have done it, Mr. Lundgren.

Mr. FLETCHER.—We object to the question. It is a matter of argument.

The COURT.—The question has been answered. The objection is sustained.

Mr. TEATS.—I wish to offer the time-book in relation to all the work done by McArthur and Beyers during the months of April and May.

Mr. FLETCHER.—It is all given together. I will supplement his offer and offer the whole book, which will show what he wants as well as what the jury will want to find out, perhaps.

The COURT.—It should be sealed in some way so that that part of the book—

Mr. FLETCHER.—It runs all through the book.

The COURT.—Very well, there being no objection the whole book [251—191] will be admitted.

Thereupon said book is received in evidence by the Court and marked as Defendant's Exhibit Number 11.

Mr. FLETCHER.—In regard to Exhibit Number 10, I will leave a mark at the page—the pages are

(Testimony of Charles S. Lundgren.)

not numbered—that the witness was examined in regard to.

The COURT.—That was in January.

Mr. FLETCHER.—That was in January.

Direct Examination (Continued).

(By Mr. EVANS.)

Q. There are a few questions on direct I would like to ask this witness: You have been under the glue-house there? A. Yes, sir.

Q. Did you make any measurements down there to ascertain the width of the two uprights or guides that the counter-weights run in? A. Yes.

Q. How wide are they?

A. Not the weights, no, sir; I did not measure the weights.

Q. Did you measure the width of the space on either side of it? A. No, sir, I did not measure it.

Q. Now, did you measure the distance from the sill up to the floor?

A. I measured the distance from the mud up to the joist, yes, sir.

Q. That is shown on this Exhibit 3, from the mud underneath [252—192] up to this joint at the top in the seats where the counter-weights run.

A. Yes, sir.

Q. What is the distance? A. It was 60 inches.

Q. What is the condition under the glue-house there as to being open or obstructed?

A. It is open.

Q. Are there any obstructions under there outside of the well of the elevator and the uprights that the

(Testimony of Charles S. Lundgren.)

counter-weight runs in?

A. No, sir, not to my knowledge there ain't.

Q. Did you measure this space in Exhibit Three where you see Allstrum's picture, this space between these two joists?

A. No, sir, I did not measure that.

Q. Approximately how wide is the space, do you know? A. About four feet, I think.

Q. Had you been under there before the accident to Godo? A. Yes, sir.

Q. Familiar with the conditions under there?

A. I never took any particular notice.

Q. It is open there on figure 3 where you see Allstrum, or is it not? A. I think it was.

Q. Were there two openings there on the side of the counter-weights? A. I think so, yes, sir.

Q. Now, showing you this photograph, Defendant's Exhibit 2, I will call your attention to this blue pencil square on it. [253—193] A. Yes, sir.

Q. If a man went under there he would come right face to face with this place on 3 where Allstrum is, wouldn't he? A. Yes, sir.

Q. Go straight ahead and step over that beam?

A. Yes, sir.

Q. Would he then have clear space around there or was there anything in the way?

Mr. TEATS.—We object to that as leading.

The COURT.—Objection overruled.

Q. Was there anything to obstruct him after he got over there, over the beam marked 3?

(Testimony of Charles S. Lundgren.)

A. No, sir.

Q. What is that picture?

A. That is the basement.

Q. Is this Exhibit 7 I hand you below the wool-pullery? A. Yes, sir.

Q. Could go under the building from there, could you? A. Yes, sir.

Q. What other ways could you go under?

A. From the inside there was another route, but I never went down there myself.

Q. Now, did you know anything about what was done down there at the time they did the work on the ringer foundation? A. Yes, sir.

Q. Who placed the trough that was put down there? A. I do not remember who placed it.

Q. Do you know where it was placed?

A. Very near. [254—194]

Q. How was it placed with regard to the space where the counter-weights run down, the two up-rights, did it go out between those up-rights or not?

A. I do not think so.

Q. If it had, the counter-weights would have come down on it, wouldn't it? A. Yes, sir.

Mr. TEATS.—I object to that.

The COURT.—Objection sustained.

Q. Were you back in back of the elevator along the foundation as shown by Exhibit "H"?

A. Yes, sir.

Q. How does the foundation go down in reference to the mud?

A. Why the sill goes close to the mud.

(Testimony of Charles S. Lundgren.)

Q. Did you ever know of anybody going under that counter-weight there between those uprights?

A. No, sir.

Q. Did anybody have any occasion to go through there that you know of?

A. Not to my knowledge.

Cross-examination.

(By Mr. TEATS.)

Q. Before the construction of this new building, the new addition, you went through this way to get under the things as a rule?

A. There was an opening there, yes, sir.

Q. Sort of door? A. Yes.

Q. But when they constructed this new building that was [255—195] taken away?

A. No, sir.

Q. That was taken away. Hasn't that platform been taken away? A. No, sir.

Q. Is it still there? A. Yes, sir.

Q. And the door there?

A. There is a hole there, yes, sir.

Q. Was the hole there, and the boards boarded up and down there? A. Part of them.

Q. Then you have to crawl thirty feet practically, pretty near thirty feet on your hands to get to this door, wouldn't you have to if you went through from the west side of the building?

A. The width of the building.

Q. Otherwise you just simply got down through

(Testimony of Charles S. Lundgren.)

that hole there and got on through if you wanted to go in, that would be the best way, wouldn't it, after the building was completed, as it was on the 27th of May last, 1911? A. It would be shorter.

Q. It would be a better way, wouldn't it. In other words when they built this—

Mr. EVANS.—We object to that. Let the witness answer the question.

Q. It is a better way, isn't it?

A. It would be a quicker way to get in there.

Q. You could walk after you got through that hole, walk pretty near straight up, couldn't you? [256—196] A. Pretty near, yes, sir.

Q. And then a person going through there would naturally pass through one of these openings, wouldn't he, if he wanted to get into this other department here?

A. I do not know whether they would or no.

Q. That would be the natural way to go wouldn't it, wouldn't it?

A. I don't know whether it would be or not.

Q. You would not climb over the sill to go along through here into this mud and make a long route through that mud, would you?

A. Well there is not as much mud as there is going through the other way.

Q. It is all mud through here, isn't it?

A. No, not altogether it is not. It is so that you can stand on it.

Q. And you could go through some of those places up to your hips in the mud, wouldn't you?

(Testimony of Charles S. Lundgren.)

A. Yes.

Q. Go in the rat holes? A. Yes, sir.

Q. You did not see this trough when it was placed whether it was through that opening or not, did you?

A. I do not remember.

Q. It could go through that opening, the opening is big enough, isn't it?

A. It is big enough, but it would have been broken if it had.

Q. But the opening is big enough to stick the trough through?

A. You mean between the elevator guides?

Q. Yes, sir. A. Yes, sir.

(Witness excused. Adjournment.) [257—197]

November 27th, 1912.

The call being waived and the jury being present, the trial of this cause was continued as follows:

CHARLES S. LUNDGREN, being recalled, continues his testimony as follows:

Direct Examination (Continued).

(By Mr. EVANS.)

Q. Mr. Lundgren, did you make any examination of the uprights and guides of the elevator shaft with a view of ascertaining how high the counter-weight formerly travelled? A. Yes, sir.

Q. Did you take any measurements at that time, since the change, or was there anything on the track or guide to indicate where the counter-weight formerly ran to, how high? A. Yes, sir.

Q. What is the condition?

A. The wear of the guides.

(Testimony of Charles S. Lundgren.)

Q. Does it show on the guide? A. Yes, sir.

Q. Was there anything above where they ran to indicate exactly where it stopped?

A. The guides are above the frame-work and the guides and the whitewash up above.

Q. They were whitewashed up above? A. Yes.

Q. And from that you are able to state where the counter-weight formerly run to?

A. Yes, sir, practically. [258—198]

Q. The counter-weight as now constructed runs to the top? A. Yes, sir.

Q. Did you take a measurement beneath the joists at the bottom to ascertain how far down the counter-weight runs? A. Yes, sir.

Q. What is this, what does this little bottle represent?

(Referring to model just brought before the jury.)

A. It represents the guide and counter-weight.

Q. Has there been any change in the distance that the elevator itself travels? A. No, sir.

Q. The elevator now travels the same distance it did before? A. Yes, sir.

Q. What is the difference now in height that the counter-weight travels from what it travelled before?

A. Thirty-eight inches.

Q. Then do I understand you at this time that the counter-weight stopped 38 inches above where it stopped before? A. Practically 38 inches.

Q. Can you illustrate with this model to the jury where the counter-weight travelled before and where it works to now? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. I wish you would do so.

(Witness demonstrates on model.)

A. That is practically where it goes now.

Q. I will mark with an AB a line that indicates where the counter-weight travels to.

A. At the present time.

Q. At the present time at the top? [259—199]

A. Yes, sir.

Q. Where does the track indicate it formerly ran?

A. About like that (demonstrating).

Q. Where I now mark CD. The difference between those two is how much?

A. About 38 inches. No, over forty.

Q. What does this piece marked joist 3 by 12 represent?

A. That is just the floor joist at the bottom.

Q. How much does the counter-weight now travel below the joist? A. Fifty-eight inches.

Q. How much then did the counter-weight formerly travel below the floor?

A. The difference between these two points subtracted from that would represent the difference.

Q. Twenty inches? A. Twenty inches, yes, sir.

Q. Was anyone with you when you made those measurements? A. Yes, sir.

Q. Who was it? A. Joe McMillan.

A JUROR.—Q. Was there twenty inches below the bottom of the 3 by 12 joist or 20 inches below the top? A. Below the bottom.

(By Mr. EVANS.)

Q. Can you take this and demonstrate how that

(Testimony of Charles S. Lundgren.)

would appear on the old counter-weight when it was all the way down before?

(Witness illustrates.)

Q. It would appear at the mark below the piece marked joist [260—200] 3-12, which I now mark with EF, is that correct? A. Yes, sir.

Q. Assuming that is 20 inches? A. Yes, sir.

Q. That represents the 20 inch mark?

A. Yes, sir.

Q. Is that model built to a scale?

A. Well, not to an absolutely close scale; it is pretty near scale.

Q. What scale? A. An inch to the foot.

Q. That was built more to illustrate?

A. To illustrate with, yes.

Cross-examination.

(By Mr. TEATS.)

Q. You were there when the elevator was put in?

A. No, sir.

Q. When did you go there? I thought you were there at work for the company when the elevator was installed. A. No, sir.

Q. When did you go to work as to that time?

A. It would be five years ago January when I went to work.

Q. Five years in January? A. Yes, sir.

Q. Did you ever see that counter-weight work—

Mr. EVANS.—That is objected to as not proper cross-examination.

The COURT.—Objection overruled.

Mr. EVANS.—Exception.

(Testimony of Charles S. Lundgren.)

Q. Did you ever see that counter-weight work up and down? [261—201]

A. Why I have through the boards.

Q. How?

A. I have through the boards on the floor.

Q. Down on the floor? A. Yes, sir.

Q. Did you ever see it work up above?

A. No, sir.

Q. Never saw it work up above? A. No, sir.

Q. Then your measurements up there is not the measurement as to the height it goes up to the point now? A. Yes.

Mr. FLETCHER.—What is that question?

Mr. TEATS.—Q. The question was you measured the height the weight goes up on the guides at this time? A. Yes, sir.

Q. Do you know whether they went up further than that? A. Why the wear on the guides.

Q. The wear on the guides? A. Yes, sir.

Q. Where is any wear on the guides?

A. From the weights or irons. It shows on the top of the guides.

Q. How is that?

A. By the wear from the counter-weight on top of the guides it shows.

Q. It shows the wear where it used to be?

A. Up above where the weights are now.

Q. Above? A. Yes, sir. [262—202]

Q. Do you know when that wear was made?

A. It must have been—

Q. Do you know when that wear was made?

(Testimony of Charles S. Lundgren.)

A. I do not know when it was made.

Q. You do not know but what the wear that was made up there might have been made a long time ago? A. It is possible.

Q. And you do not know but what the elevator might have went up to this point or to that point before the cable broke (indicating)? A. Yes, sir.

Q. So that it is a matter of speculation as to where that weight came down below, isn't it?

A. No, I do not think so.

Q. How? A. No, I do not think so.

Q. You do not know as a matter of fact whether these weights went down below that beam or not, do you?

A. Only from the measurement from the top.

Q. From the measurement in the top and the measurements of the top you do not know whether that wear was before or at any time before this change was made—it might have been made another time, mightn't it? A. The wear at the top?

Q. Yes?

A. I do not quite understand your question.

Q. What I mean is that the wear, how does the wear on the top compare with the wear below this mark?

A. It is pretty near the same thing, not quite as much.

Q. Pretty near the same thing? [263—203]

A. Yes.

Q. You say that there is some wear there?

A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. And from that you are just simply guessing that it must have went up there at one time?

A. No, I am not guessing. It had to be up there to wear it.

Q. You say that is 37 inches, didn't you?

A. Yes, sir.

Q. That would produce the weight down here about twenty inches? A. Yes, sir.

Q. Below the joists? A. Yes, sir.

Q. That joist is 12 inches? A. Yes.

Q. And 20 is 32 inches? A. Yes, sir.

Q. What makes the other six inches. Where do you get your other six inches?

A. The distance is 58 inches.

Q. How is that?

A. The distance is 58 inches below the joist at the present time.

Q. But you say that it went down below 20 inches below, didn't you? A. Yes, sir.

Q. And the joist is 12 inches, isn't it?

A. It is below that joist now.

Q. I am not talking now. Your proposition is that this elevator went below the joist, that is what you are trying [264—204] to prove ain't it, before it was repaired? A. Yes, sir.

Q. Isn't that what you are trying to prove?

A. I think so.

Q. There is 20 inches down there? A. Yes, sir.

Q. And there is 12 inches here, isn't there?

A. Yes, sir.

Q. That is 32 inches? A. Yes, sir.

(Testimony of Charles S. Lundgren.)

Q. And yet there is a space here of 38 inches, isn't there? A. Yes, sir.

Q. What become of the other six inches?

A. Added on to the joist.

Q. You gave the joist 12 and 20. A. That is 32.

Q. And this is 38. Then what?

A. The measurement is from 58 inches below the joist.

Q. You don't understand me or I don't understand you. Your proposition is according to the length here there was 38 inches difference?

A. At the top.

Q. That is all. A. Yes, sir.

Q. In other words it is 38 inches in all?

A. Yes, sir.

Q. Now; this thirty-eight inches you say is what?

A. Is deducted from the 58 inches.

Q. This 38 inches would put it up here, would it (indicating)? A. Yes. [265—205]

Q. 58 inches from where?

A. From the bottom of the joist.

Q. From the bottom of this joist? A. Yes.

Q. Down to this plank?

A. Down to the beam of the counter-weight.

Q. Down to the beam of the counter-weight?

A. Yes.

Q. That is 58 inches? A. Yes, sir.

Q. The counter-weight goes down about how far to the sill—how far from the sill?

A. There is not any sill there.

Q. There was a sill there?

(Testimony of Charles S. Lundgren.)

A. There is some planks there.

Q. And how far does it go from that plank?

A. Probably an inch or two.

Q. Was that plank there when Louis Godo got hurt? A. I do not know. I suppose it was.

Q. Then the plank was in the same position when Louis Godo got hurt, was it? A. I think so.

Mr. FLETCHER.—That is not cross-examination.

Mr. EVANS.—We move to strike out all that as not proper cross-examination.

Mr. FLETCHER.—This witness was asked nothing about Godo and the plank.

The COURT.—Motion denied.

Mr. EVANS.—Exception.

The COURT.—Exception allowed. [266—206]

Q. Now, you say that it is 58 inches from the lower portion of the joists down to the bottom of the weight? A. Yes, sir.

Q. Practically five feet?

A. Lacking two inches.

Q. And that the weight goes down within an inch or so of this plank?

A. An inch or two, something like that.

Q. And did you examine any other portions of the guide?

A. I could not tell anything about the guides at all.

Q. Could not? A. No, sir.

Q. There was nothing there to indicate more wear than the present. A. No, sir.

(Testimony of Charles S. Lundgren.)

(By Mr. EVANS.)

Q. The appearance of the guides at the bottom is the same as the rest of it, isn't it, it is worn?

A. Practically, it is worn now and covered with grease.

Q. Now, how did you make these measurements you testified about, by running the counter-weight up? A. Yes, sir.

Q. And the elevator clear down?

A. Yes, sir; run the elevator clear down.

Mr. EVANS.—That is all.

(Witness excused.) [267—207]

[Testimony of Joseph McMillen, for Defendant.]

JOSEPH McMILLEN, a witness called for and on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination.

(By Mr. EVANS.)

Q. State your name. A. Joseph McMillen.

Q. Where do you live?

A. 3598 East L street, Tacoma.

Q. What is your occupation?

A. My main occupation is ship-building.

Q. Ship carpenter, you mean?

A. Ship carpenter.

Q. Where are you employed?

A. At the Carstens Packing Company.

Q. How long have you worked there?

A. A little over two years.

Q. Who is the foreman there of the carpenters?

(Testimony of Joseph McMillen.)

A. Mr. Lundgren.

Q. Did you assist him in making some measurements in reference to the height of the counter-weight on which the elevator travelled?

A. Yes, sir.

Q. Did the track indicate where it had run before?

A. As near as we could find out, yes.

Q. Did you make any measurements about the difference between where it runs now and where it run before at the top of the shaft?

A. Yes, sir.

Q. What was that difference? [268—208]

A. Well, to tell it my way is that the counter-weight goes 58 inches below the joist now.

Q. Below the joist now?

A. Yes, sir.

Q. What is this?

A. That is the counter-weight, I should judge.

Q. Can you take that and illustrate to the jury where the counter-weight runs to at the top now as compared to where it ran to before?

A. I think I can.

Q. I wish you would do it?

A. According to the way we figured it and measured it—

Q. Where does it run to now?

A. The counter-weight when the elevator is up is down there—(indicating the bottom of the shaft) it used to run there, that is, I call that three feet and two inches to where it runs now.

Q. Does this cross indicate where you figure it ran to?

A. Yes.

Q. Does the mark EF at the bottom of this up-

(Testimony of Joseph McMillen.)

right? A. Yes, sir.

Q. Now, where does the counter-weight run at the present time at the top?

A. It runs an equal distance from here to here less —(illustrating).

Q. Illustrate on there where it runs to at this time.

A. It runs to here (illustrating).

Q. That is the place here where I have a mark.

A. We are taking our measurement from the bottom, to the bottom. [269—209]

Q. It runs from A to B? A. Yes, sir.

Q. Where does the wear on the track indicate it ran to before? A. It used to run from here.

Q. That is from EF? A. Yes, sir, to there.

Q. To the line marked CD? A. Yes, sir.

Cross-examination.

(By Mr. TEATS.)

Q. Did you mean to say that the weight went clear to the top of the guides before?

A. No, it did not go clear to the top of the guides.

Q. How far from the top of the guides?

A. We did not measure that. We simply found the mark showing as high as the weight had travelled, as near as we could find it from the wear and grease.

Q. There is not much there to indicate it positive, is there?

A. According to measurement it proves itself.

Q. I see, if you guess at the measurement here?

A. Yes, sir.

Q. Have you guessed at the measurement here (in-

(Testimony of Joseph McMillen.)

dicating)? A. No, we measured that.

Q. If you measured 58 inches here, of course you can go up there and make the same measurement there and guess where it went to?

A. We found as near as we could before we made any measurements.

Q. The difference it ran up in the guide there was a mere [270—210] matter of guesswork?

A. Well, as far as that is concerned it was where we could see as far as it had worn.

Q. And that might have worn some other time, you don't know when that was worn?

A. Might have worn before I was there.

Q. And it was not very much worn, was it?

A. No, naturally would not be.

Q. It was not much worn between these two sides here? A. No.

Q. Compared to what it was down below?

A. No, the upper end where it stops has less wear than it has in the travelled part.

Q. Thirty-eight inches here is not worn so much as compared below with 38 inches? A. No.

Q. There was not any wear down below here, below this place?

A. Not so much as there is through the middle.

Q. All the way up and down there the wear is about the same? A. Just about the same.

Q. Just about the same.

(By Mr. FLETCHER.)

Q. Mr. McMillen, was the upper part of this track painted or whitewashed or anything so that the wear

(Testimony of Joseph McMillen.)

would be observable? A. No, sir.

Q. This part was not whitewashed?

A. No, sir, just the natural color of the wood, only for the grease. [271—211]

Q. How was it around the outside?

A. It has just the natural wood.

(By Mr. TEATS.)

Q. Then all you could go by would be the natural wood and natural wear and tear there? A. Yes.

Q. No paint and no whitewash to indicate anything?

Mr. TEATS.—He says no. You say no to that answer, do you? A. I say no.

(Witness excused.) [272—212]

[Testimony of Peter Cornils, for Defendant.]

PETER CORNILS, being recalled, continues his testimony as follows:

Direct Examination.

(By Mr. EVANS.)

Q. Were you the master mechanic there at the time the elevator was installed? A. Yes, sir.

Q. Are you familiar with it from the time it was installed down to the time the cable broke and the counter-weight was refastened to it? A. Yes, sir.

Q. Had that cable ever broken from the time it was installed until it broke at the time in question?

A. No, sir.

Q. Had the cable ever been changed up to that time from its original construction? A. No, sir.

(Testimony of Peter Cornils.)

Cross-examination.

(By Mr. TEATS.)

Q. How do you know? A. How do I know?

Q. Yes. A. There was no occasion for a change.

Q. How do you know?

A. I know there had not been any occasion for a change.

Q. Have you looked over your time-book to see whether there was any change or not?

A. It could not be changed; there was no occasion.

Q. Have you looked over your time-book? [273
—213]

A. It was not necessary to have it in the time-book because there was no break occurred.

Q. The only way you can tell anything over there is by the time-book, isn't it?

A. No, sir, I can remember too.

(Witness excused.)

Mr. EVANS.—We wish to offer the model for illustration before the jury.

The COURT.—It will be admitted.

Thereupon the said model is received in evidence by the Court and marked as Defendant's Exhibit 12.

Defendant rests. [274—214]

Rebuttal.

**[Testimony of Louis Godo, in His Own Behalf
(Recalled).]**

LOUIS GODO, being recalled in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. You heard yesterday what Pete Cornils said

(Testimony of Louis Godo.)

about getting the peevy? A. Yes, sir.

Q. Did he ever tell you anything about getting the peevy?

A. That is the first time I heard of the peevy, was yesterday.

Mr. FLETCHER.—I object to this as not rebuttal. It is part of their case in chief. He is prepared, I take it, to tell what took place, and that was what he had to do in his case in chief, and now we have contradicted that. He has testified I think that he wanted to get some instrument or peevy or something, and Pete would not let him.

Mr. TEATS.—No, he did not say anything about that. He said he wanted to take up the plank.

The COURT.—Objection overruled. This goes to the direct contradiction of the defendant's witnesses. Exception allowed.

Mr. TEATS.—That is all.

Mr. EVANS.—That is all.

(Witness excused.) [275—215]

[Testimony of Mr. Carroll, for Plaintiff (Recalled).]

Mr. CARROLL, being recalled by the plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Mr. Carroll, while you were there with Godo, after taking him from the building and up to the time of taking him away in the carriage, did you hear Pete Cornils ask him, Mr. Godo, in substance, "Why didn't you take up the plank?" or "Why did you go

(Testimony of Mr. Carroll.)

under the building"? A. No, sir, I did not.

Q. Were you there all the time?

A. I was within 15 or 20 feet of him most of the time, yes, sir.

Cross-examination.

(By Mr. EVANS.)

Q. How many people were around there at that time? A. Well, now, I could not say.

Q. Quite a bunch gathered?

A. There was I should judge six or eight, maybe ten, maybe more.

Q. Everybody talking more or less?

A. Well, yes.

(Witness excused.) [276—216]

**[Testimony of H. E. Hanson, for Plaintiff
(Recalled).]**

H. E. HANSON, being recalled on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. After taking Mr. Godo out from under the building did you hear Mr. Cornils say to Godo, why didn't you take up the plank, or why did you go under?

A. He never so far as I was there, he never said a word of that kind.

(By Mr. EVANS.)

Q. How many people were there?

A. Oh, quite a few.

Q. Everybody talking some?

A. Few of them. When we got him out first there

(Testimony of H. E. Hanson.)

was only a few but they came right along after that.

(Witness excused.)

Plaintiff rests. [277—217]

Medical Testimony.

[Testimony of Dr. E. M. Brown, for Plaintiff.]

Dr. E. M. BROWN, a witness called for and on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. Your name is E. M. Brown? A. Yes, sir.

Q. You are a regular practicing physician and surgeon under the laws of the State of Washington?

A. Yes, sir.

Q. And have been for several years last past?

A. Yes, I have.

Q. Are you acquainted with Mr. Godo, the plaintiff in this case?

A. Yes, sir, I have known him since the first few days in March.

Q. What year? A. Of this year.

Q. Describe to the jury the conditions he was in when he first came to you, and all about it.

Mr. EVANS.—That is objected to for the reason that it is after the time of the accident and too remote.

The COURT.—You will endeavor to trace the medical testimony and the treatment from the time of the injury up to the time Dr. Brown saw him?

Mr. TEATS.—We are going to have other doctors.

Mr. EVANS.—I would rather have it put in in the

(Testimony of Dr. E. M. Brown.)

proper way, and have this witness come up later.
[278—218]

Mr. TEATS.—The doctor expects to leave town.

The COURT.—On account of the witness leaving— When do you expect to leave, Doctor?

The WITNESS.—I am supposed to be in court in Chehalis to-morrow.

The COURT.—I think the explanation is sufficient to put it in out of order.

Mr. EVANS.—Exception.

The COURT.—Exception allowed.

Mr. EVANS.—I understand the history of the case will have to be shown up to the time of the condition that this doctor testifies about, or this will not be admissible and it will be stricken.

Mr. TEATS.—I do not suppose we have got to have any other doctors here. We have described the injuries. The plaintiff has described everything that has been done, and now the doctor will go on and testify to what the conditions were from March on. We are not compelled to put any other doctors on the stand if we don't want to. We are going to, but we don't want this testimony to be upon any condition at all. We might put on the company doctor or we might not, we are not compelled to, but we will put on some other doctors.

Mr. EVANS.—I desire to object to the evidence on the further ground that the witness was in the courtroom while the plaintiff was testifying, in violation of the rule which was invoked at the request of counsel for the plaintiff.

(Testimony of Dr. E. M. Brown.)

The COURT.—The motion denied and motion overruled. This witness was not here when the order was made, and has been in the courtroom only a short time. [279—219]

Mr. EVANS.—Note an exception.

The COURT.—Exception allowed. I will say that in other cases it has been customary to waive the rule so far as the medical testimony was concerned.

Mr. EVANS.—If that is the custom I will waive it in this case as to the physician.

(Question repeated.)

A. His left foot was swollen, being an inch and over larger in circumference than the right foot. The foot was rigid so that I could make very little motion in any direction, either extending it or drawing it up or from one side to the other. The foot was bluish and cold to the touch. The circulation was imperfect in that respect so that the foot was a different color and cold to the hand. The back in the seat of the accident had lost its natural curvature. He stood with his back in a straight immovable condition, and the muscles on each side of the bone—right in the center of the back is a hollow between the side muscles. Those muscles were rigid and hard so that they stood out and were not yielding like a normal muscle. When I would push on them or press on them they were rigid. The motion of the back, sideways, turning around or bending forward, were limited. If he wanted to turn around he would turn his whole body, and he was especially tender on

(Testimony of Dr. E. M. Brown.)

the back at what is known as the lumbar region, just about where you speak of as the small of the back, and where the pelvic bone joins the back it was more tender on one side than the other. On the sides pressure elicited symptoms of pain, [280—220] causing a quickening of the heart action, rapid pulse, and flinching and contracting of the muscles, indicating pain, and on the left side, somewhere in the region of where I have my hand, I do not remember exactly, there was a hard cartilaginous lump which was immovable. Not movable to any great extent, but it was not fixed solid to the bone, but I could move it about a little. That I would state has disappeared. I am not able to find it now. He complained of pain being greater on the left side at that time than on the right, but on the right side I found what I thought was a fractured condition about the 7th or 8th ribs, but there was no deformity, anything indicating any deformity of the bones, but there was a thickening at that place; might have been callous or it might have been a swollen condition of the covering of the ribs, so that when I pressed along the right side I could feel a lumpy feeling.

At the present time he complains— (Interrupted.)

Mr. EVANS.—We object to what the gentleman complains of. Let him testify what conditions he found.

The WITNESS.—At the present time there is apparent pain. Slight pressing there causes the drawing away and flinching and symptoms of pain. The

(Testimony of Dr. E. M. Brown.)

left side is not painful like it was on the start. The apparent pain was greater on the left side when he started, but it is not now, but on the right side we find indications of pain and drawing away from pressure. On the breast bone there were two points that seemed to be abnormal, about where the second rib joins the breast bone there was a swollen [281—221] condition of the bone or cover of the bone. Running my finger up and down there was callus or thickening of the tissues covering the bone, and also the tip of the breast-bone was drawn in and was abnormally moved. That last condition now, if any different, allows the bone to stand out more than it did then. That is the lower end of the bone seems to be thrown in abnormally greater than it was normally. I will state I use the word “seems” because there are no two persons that will be exactly alike at the lower end of the breast-bone, but in the early days when I was treating him, that seemed to be drawn in while now it is not drawn in and there is a lump about two inches from the lower end. The upper lump has practically disappeared. He still holds his body in a rigid condition, and I get the symptoms of pain in causing movements of the body or pressure at the points that I would expect on the left side. That is a great deal less than it was. The foot at the present time is not swollen like it was. It has lost its hard feeling. Before it felt like it was filled with cement, cement-like feeling, and now it has lost that feeling and has more the appearance of a flat foot than it did when I first saw it, that is the

(Testimony of Dr. E. M. Brown.)

arch has settled down more than it was and is inclined to dip in. The inner angle sags down nearer the floor or ground than it did, and one side of the foot at the arch is lower than it was when I first commenced to see him. The motions of the foot are better than they were, but he has not the full motions like the other foot.

Q. Have you been treating him since March?
[282—222]

A. Yes, sir, I have been treating him.

Q. What would you say as to his back, his comparative condition of his back, that is relatively, compared with the time you first saw him in March and for instance yesterday when you saw him?

A. Well, his back is not any better. He is inclined to be bent more forward than he was, more of a settled down condition. I forgot to state first that the muscles over the abdomen have always been and still are rigid, and in pressing over the abdomen he has symptoms of pain so that the muscles are at all times rigid, cannot get him to relax his muscles, and they seemed to be drawing the chest rather down and forward and give him more that leaning forward condition.

Q. What would produce that condition, Doctor?

A. An injury to the internal viscera, or spraining of the diaphragm or general injury of the viscera, that is the stomach and intestines, by being injured or disease allowed to drop down and being tender, causing the rigidity of the muscles to protect those organs; and it could also be done by a direct injury

(Testimony of Dr. E. M. Brown.)

or sprain to the abdominal muscles.

Q. For instance, Doctor, a man, the plaintiff in this case, was in a space about 26 inches, and while in a stooping position a weight of 16 or 17 hundred pounds, being the counter-weight of an elevator, came down and struck him upon the shoulder and crushed him into the mud beneath, the weight you see in Exhibit 4—this counter-weight, came down and struck him just below the shoulder and below the clavicle— [283—223]

The COURT.—You have that word wrong, haven't you Mr. Teats? It is scapula and not clavicle.

Mr. EVANS.—He pleaded clavicle in his complaint, and I was anxious to find out how it could be.

Mr. TEATS.—Scapula, if the Court please.

Q. Now, what would you say as to the condition you found him in, as to having been produced by that accident?

A. Such injuries could be produced by that, that is injury to the body and chest.

Q. And to the foot?

A. Well, that could be produced in connection with it, anything to throw the weight of the body or a strain or pulling in putting his foot in any unnatural position, great pressure against it would cause strain or breaking of ligaments and joints in the foot.

Q. Where was the injury in the foot?

A. It seemed to be the whole instep. There is a density between all the bones, that is, you cannot get any motion. There is a positive limitation of motion between the seven bones of the foot where they

(Testimony of Dr. E. M. Brown.)

articulate with each other. They are all rigid and bound together and they still are in that condition, and so far as the injury to the foot is concerned, it was a severe straining of the attachment of one of these bones to the other, possibly a fracture of some bone, but I have never diagnosed a fracture, so that I will say it is a general injury to several articulations and attachments of the ligaments and tendons in that region.

Q. What would you say as to the condition of the foot being permanent or otherwise? [284—224]

A. I consider the injury is permanent, that is, he will have a flat foot and weakened foot. It will probably improve though.

Q. What would you say as to the back?

A. That will probably improve. I think, though, with the condition it has been in all these months I have been treating it—these nine months, it will be a long time, be perhaps a couple of years yet, before he will be positively free from the pain, but I think there will always be a weakened condition of the back.

Q. What would you say as to his being able to work as a carpenter around buildings and so on?

A. At the present time?

Q. No, in the future.

A. Well, it would be limited. The injury to the foot would make the work more dangerous to him and would interfere with his work, and the lack of flexibility of the back would impair him for anything but selected work.

(Testimony of Dr. E. M. Brown.)

Cross-examination.

(By Mr. EVANS.)

Q. In the course of a couple of years you think he will be practically all right then, Doctor?

A. I think he will probably be better. I cannot tell, but he will probably be better.

Q. You think he will be practically all right at the end of two years?

A. No, I do not think he will be all right, because the man's condition has not improved to any great extent—

Q. I just want to find out— [285—225]

A. (Continuing.)—in the year, so that I do not think he will be all right in two years.

Q. In how many cases of this nature have you been the attending physician for the plaintiff wherein Mr. Teats was the attorney for the plaintiff?

A. I could not tell you how many. I could probably find out but I could not tell you.

Q. A good many hundred?

A. No, not in the hundreds.

Q. Not in the hundreds? A. Oh, no.

Q. You have been Mr. Teat's medical witness in damage cases for the past ten years, haven't you?

A. I have often been a witness for him during the last period of years; I do not remember the number, perhaps ten, maybe 12.

Q. In this case, did you see him before you saw the patient? A. How is that?

Q. Did you see him before you saw the patient in this case? A. Mr. Teats?

(Testimony of Dr. E. M. Brown.)

Q. Yes? A. No, sir.

Q. Did the patient *told* you that Mr. Teats sent him to you?

A. He did yesterday or the day before.

Q. Were you advised at the time he came to you that there was a damage suit pending?

A. I do not remember whether he told me anything about it or not. I know that the man himself told me that there would be a case of litigation, but I do not remember. Of course, coming the way he did, I presume that I thought [286—226] it would be, but I am not certain about it.

Q. I think that is all.

Redirect Examination.

(By Mr. TEATS.)

Q. You have also appeared in court for Ellis & Fletcher, haven't you? A. Yes, sir.

Q. And Mr. Evans? A. Yes, sir.

Q. And when they have cases for the plaintiff they ask for your assistance too? A. Yes, sir.

Q. And your expert knowledge? A. Yes, sir.

Recross-examination.

(By Mr. EVANS.)

Q. When did you appear for me?

A. Ellis & Fletcher?

Q. I am talking about Fletcher & Evans.

A. I do not know which one it was. The firm I suppose. I remember one of them, I went down in the Grays Harbor country I know.

Q. There was one case for the firm of Ellis &

(Testimony of Dr. E. M. Brown.)

Fletcher several years ago, was there not?

A. How is that?

Q. There was one case for the firm of Ellis & Fletcher a good many years ago, was there not?

A. I think so, I am not certain. [287—227]

Q. And that is all, wasn't it?

A. No, the firm, they have consulted me about other cases, whether or not it has been in court, whether they have gone into court or not I do not know, because the majority of the attorneys that consult me about cases, the cases do not get to court, in the majority of them.

Q. But you have been a witness for Mr. Teats frequently, a professional witness for a good many years? A. Yes, sir.

Q. And you will average once or twice a month on the witness-stand in that time, wouldn't you, sometimes a good deal oftener?

A. On some months, yes, sir; I have two in a day sometimes.

Q. There are different causes of swelling in the human body, are there not? A. Yes, sir.

Mr. TEATS.—Q. From what you saw would you say that that was from the accident and the injury he received?

A. From traumatism, an injury to the foot, this condition was.

Mr. EVANS.—Q. Might be from a dropsical condition or something else?

A. Not this thickening.

(Testimony of Dr. E. M. Brown.)

(By Mr. TEATS.)

Q. The swelling might be from some disease?

A. It might be from inflammation of the bones, but could not have been from dropsy.

Q. It could have been from some disease?

A. Yes, it could have been from osteitis or something like that, but it was not. [288—228]

(By Mr. EVANS.)

Q. You are positive of that?

A. Yes, I am positive.

Q. That is all.

(Witness excused.) [289—229]

[Testimony of Dr. John Reitz, for Plaintiff.]

Dr. JOHN REITZ, a witness called and sworn on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

(By Mr. TEATS.)

Q. What is your name? A. John Reitz.

Q. Are you a regular practicing surgeon and physician under the laws of the State of Washington?

A. Yes, I am.

Q. And were you a year ago? A. Yes, sir.

Q. You are a graduate of—

A. I am a graduate of the German University of Munich.

Q. Of the medical department?

A. Yes, sir, and admitted by the State examination in Spokane two years ago.

Q. When did you first see Mr. Godo, the plaintiff sitting here?

(Testimony of Dr. John Reitz.)

A. I saw first Mr. Godo on the 8th day of August last year.

Q. 1911?

A. 1911, yes, and he was under my treatment until the 20th of October of the same year.

Q. You met him at your office?

A. Yes, sir, I met him the first thing in my office.

Q. Did you examine him then?

A. I examined him in my office, yes.

Q. And for what did you examine him?

A. He was complaining about inability to walk, it hurts so awful much when he is trying to walk, and sleep, and [290—230] he told me he was hurt some time in going under an elevator, and since that time would not be able any more to do anything to walk and get around, and I examined him for this.

Q. What did you find as to his foot?

A. I found swelling of the left ankle, below the left ankle, around the left foot. This kind of swelling was pretty clear. I compared this with the other side, and there was some very clear difference in the size. By touching it it was very painful, and he could not move his foot up and down in the front direction. I found it was a stiffening of the ligament. The bones were all right; there was nothing broken, but I think the matter was not with the bony part of the leg, but the ligaments were not in order.

Just in the place where the ligament should be there was a swollen place, and this awful hard pain by touch. In this way I found out the twisting of the ligaments of the left foot below the ankle. There

(Testimony of Dr. John Reitz.)

was bruises of the 8th and 12th ribs near the sternum line—that is this line here (indicating breast-bone), there was very clear bruising and swelling, too, and same kind of bruises was on the back side and lumbar part of the spine. That was the condition which I found by examination.

Q. How long did you treat him, doctor?

A. I treated him until the 20th of October.

Q. From August until the 20th of October?

A. Yes.

Q. Then did he come to you any more? [291—231]

A. No, he did not come up any more to my office. He got a little better, and after while did not call any more in my office.

Q. What would you say would be the cause of the conditions you found?

A. What are the causes of this condition?

Q. Yes.

A. He told me about his accident to the elevator—
(Objected to.)

Q. What would you say, sudden pressure or what?

A. I would call it a sudden, yes. I would call it pressure on this part of the body where these bruises were.

Q. Then say, for instance, Doctor, in May, the latter part of May, previous to the time he came to see you, Mr. Godo was about this position (illustrating), and while in this position a heavy weight of some seventeen or eighteen hundred pounds came down upon him striking him across the shoulder blades, and

(Testimony of Dr. John Reitz.)

crushing him down into the mud so that his face stuck in the mud. Would you say that weight and that pressure would cause the condition that you found in his body?

A. Yes, that would be able to cause this condition, certainly.

Q. That is all.

Mr. EVANS.—That is all.

(Witness excused.)

The COURT.—Is your other doctor here, Mr. Teats?

Mr. TEATS.—The other doctor is not here yet. We expected to have Dr. Quevli. [292—232]

The COURT.—You may make your statement, Mr. Evans.

Mr. EVANS.—We would prefer to wait until counsel has closed his case.

The COURT.—I understand he has closed, except this particular doctor.

(Discussion.)

Mr. TEATS.—Well, we will close without Dr. Quevli. [293—233]

Thereupon, and after argument by counsel to the jury, the Court charged the jury as follows:

GENTLEMEN OF THE JURY:

It will now be your duty, after the instructions of the Court, to determine the issues between the plaintiff and the defendant in this case. You will take the pleadings out with you consisting of the complaint and supplemental complaint and answer and reply, and these pleadings will show you exactly

what the allegations are that the plaintiff makes, and exactly what denials the defendant makes, and what additional allegations the defendant makes.

But briefly the complaint of the plaintiff alleges that the defendant was negligent in not warning him of the hidden danger of which he had no knowledge, and he was injured on account of that negligence. The defendant denies that it was negligent, and alleges that it had no idea he was going where he did go when he got hurt, as his orders were to go somewhere else. The defendant alleges that he assumed the risk that resulted in his injury, and alleges that he contributed to the happening of the accident in which he was injured by his own negligence or want of ordinary care. This allegation of the assumption of risk on his part and of contributory negligence the plaintiff denies in his reply.

Under these pleadings the burden of proof is upon the plaintiff to establish the particular negligence which he alleges that the defendant was guilty of, and [294—234] on account of which negligence he was injured. That is, the plaintiff must prove by a fair preponderance of the evidence that the defendant was negligent in the particulars of which he complains in his complaint, and that his injury was the proximate result of that negligence on the defendant's part. The plaintiff must prove by a fair preponderance of the evidence every material allegation in his complaint, except those that may be admitted by the answer.

The pleadings are not in evidence in the case. No one has offered the pleadings as evidence in the case,

and it is the rule of law that they are not considered as evidence in the case, but the admissions in the answer regarding the allegations of facts made in the complaint may be considered, because the plaintiff does not have to prove what is admitted.

This case involves questions concerning negligence and involves questions concerning the law of master and servant.

The law defines negligence to be the want of ordinary care; that is, that degree of care which an ordinarily careful and prudent person would use under like circumstances, under the same circumstances, and should be proportioned to the peril and danger reasonably to be apprehended from the want of proper prudence. This rule applies alike to both parties to this action, and may be sued by you in determining whether either or both of them have been negligent.

The plaintiff in this action is what is known in law as an employee or servant, and the defendant in [295—235] this case is what is known as an employer or master, and in these instructions when the words “master” and “servant” are used, or employer or employee are used, you will understand that they are used as applying to that relation that existed between the plaintiff and the defendant at the time that this injury occurred.

The master is under a positive duty, owes the positive duty to his employee, to provide the employee with a reasonably safe place in which to do his work. This duty being one that is positively imposed upon the master in the first instance, he will not be excused

from its performance by entrusting it to another charged with the duty to make performance for him, but who neglects to perform that duty, but the master is not an insurer of the lives and limbs of his employees. The master is not liable unless he has been guilty of some act of negligence resulting in an injury to the servant, and which has not been contributed to in any way by the servant's own negligence or want of ordinary care.

To enable the plaintiff to recover in this suit he must not have contributed in any way to the happening of the accident in question by his own negligence or want of ordinary care. Whether the defendant was negligent or whether the plaintiff was negligent are questions to be determined by you on consideration of all the facts in the case, the surroundings and situation at the time of the accident, tested by your judgment as practical men.

When a party comes into Court as has been done in this case, and alleges negligence on the part of another as a cause of action, he must, before he can [296—236] recover, establish that negligence by a fair preponderance of the evidence, and in this case if you find that the greater weight of evidence is with the defendant, or that it is evenly balanced so that you are unable to say on which side the preponderance is on that question, the plaintiff cannot recover and your verdict should be for the defendant. The defendant having come into court in its answer and alleged negligence on the part of the plaintiff, which it says contributed to the happening of the accident, the burden of proving that negligence is upon the

defendant, unless the plaintiff in his testimony has shown he was guilty of contributory negligence.

The Court in one of the first instructions given you told you that before the plaintiff can recover he must show by a fair preponderance of the evidence that the defendant's negligence was the proximate cause of his injury. Proximate cause the law defines to be the moving, efficient cause. The law says that a party is liable for all of those consequences that flow naturally and directly from his acts, and is not liable for those consequences that do not flow naturally and directly from his acts. The Court has several times in these instructions used the expression "Preponderance of the evidence." Preponderance of the evidence means the greater weight of evidence. In exact terms evidence does not weigh, but it means that evidence that appeals to your reason and understanding with the greater force, in the more convincing and persuasive manner, and creates in your mind belief in opposition to that which is brought against it. [297—237]

A servant who enters the service of the employer impliedly agrees to assume all of the risks and dangers that are ordinarily and naturally incident to the employment in which he is engaged. In this case if you believe that the injury to the plaintiff is only the result of a risk ordinarily incident to the employment in which he was engaged, and not otherwise, then he cannot recover, and your verdict should be for the defendant.

A servant, where he enters the service of the employer and remains in it, not only agrees to assume

the risks that ordinarily attach to that employment, but he agrees to assume the extraordinary risks and dangers which he knows and appreciates, or which he should know and appreciate in the exercise of ordinary care for his own safety.

The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If, on account of changes in the construction of the master's premises and appliances, the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exercise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an [298—238] ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in the exercise of ordinary care for his own safety, the master would be under no duty to

warn the servant, and would not be negligent in failing to warn the servant.

If you should find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence.

I did not enter very fully into the issues as framed by the pleadings, not only because you take the pleadings out with you and are expected to refer to them in determining what the questions are between these parties, [299—239] but because of a summary of the issues is contained in one of the written instructions.

In this case the plaintiff seeks to recover damages against the defendant. Plaintiff claims that defendant failed to perform its duty to him on account of which he received an injury.

He bases his right to a recovery on the ground that the defendant had allowed the counter-weight to the elevator formerly to stop at the floor of the building, but that some time before the day of his injury a new

cable was attached to the counter-weight which allowed the counter-weight to pass below the floor of the building down to about five inches of the ground. That from the floor of the building to the ground was a space of about four feet in height; that the workmen in defendant's employ were in the habit and in the performance of their work were required to pass under this counter-weight; that he did not know of the change in regard to the counter-weight coming down near the ground.

That on May 27th, 1911, it was necessary for him to go under the building in order to get under the wharf to make measurements for a vat. That Mr. Cornils was his boss and knew of the danger in passing under the counter-weight and knew of the change in the operation of the counter-weight but did not warn him, but on the contrary ordered and instructed him to go under the building and thence under the wharf to make the measurements, and that he in obedience to such order went under the building, and as he was passing under the counter-weight it came down and caught him, producing his injury. [300—240]

There is no evidence that the elevator or the counter-weight were in themselves defective or improperly operated, or that it was wrong in itself to have the counter-weight come down to the ground. The charge is that it did not formerly come below the floor, and that some time before plaintiff's injury it was changed and allowed to do so. That under the counter-weight was a passageway for the workmen, and that at the time of his injury he was specifically

ordered by his boss, whom he claims knew of the change in the operation of the counter-weight, to go under the building without telling him of this change, and that in the performance of his duties he went under the counter-weight in ignorance of the change and was hurt.

The defendant has answered, and for its defense states that the counter-weight operated through tongued uprights which extended all the way to the ground and up through the building. That this building is built over the tide-flats and about three feet above the wharf; that the wharf is about four feet above the ground and extends just under the building, leaving an open space of about seven feet from the ground to the floor of the building. That the space between which the counter-weight operates is about four feet wide, and is near the side of the building. That on each side of it is a small space about fourteen inches wide. That all the rest of the space under the building is open and safe for one to walk about, and about seven feet high above the ground. That prior to about the twenty-first day of January, 1911, the cable on the counter-weight allowed the counter-weight [301—241] to come to about four feet below the floor of the building, or about three feet from the ground. That about that time the cable broke near the counter-weight; that a wind of the cable was taken from around the drum and reattached to the counter-weight which lengthened the cable about three feet, so that from that time the counter-weight came down, when the elevator went to the top, to almost the ground. That this

was the condition at all times from then until plaintiff was injured.

Defendant further claims that plaintiff is an experienced carpenter and had been in its employ for many years, and helped build the wharf in question. That the side of the building where the vat was to be placed extends all the way down to the mudsill and there was no way to get under this part of the wharf by going under the building. That for some days before plaintiff's injury, he had worked under the building near the counter-weight, and knew where it was located, and how it operated and knew that all the space under the building except where the counter-weight came down, and the two small spaces on each side, was open so that one could go in safety wherever he pleased under the building, except under the counter-weight.

Before the day of plaintiff's injury he had finished his work under the building and there was no occasion or duty requiring him to then go under the building. That on the day in question defendant wanted a vat let into the wharf just outside of and adjoining the building, and wanted the space measured for a vat, and Mr. Cornils directed the plaintiff to make these measurements and took him [302—242] to the place outside of the building where the measurements were to be made, and directed him to tear up the plank in the wharf in order to find the supporting timber to which the measurement was to be made. That plaintiff had no duty or occasion to then go under the building, and that the defendant or its employees did not know that plaintiff intended

to go under the building, and without defendant's knowledge or the knowledge of its employees, the plaintiff for some reason of his own, went under the building and received an injury in some manner unknown to the defendant.

That on each side of the counter-weight is an open space of seven feet high and fifteen inches wide; that other than this space and the counter-weight space the entire under part of the building is open and safe for walking about in and about seven feet high from the ground. That the building is about three feet above the wharf, and the wharf extends just under the side and end of the building, leaving the space under the building with light sufficient for anyone to see and observe the conditions under the building, and to see and observe the counter-weight space, and the other spaces, and that if plaintiff was injured by the counter-weight coming down upon him it was, for these reasons, his own and not the defendant's fault.

The defendant also claims that the conditions and surroundings under the building and the space in which the counter-weight operated were all open and observable and were the usual and customary conditions, construction and operation; that there were no hidden dangers; that [303—243] plaintiff knew, or by the use of his eyes and faculties could have known of the conditions and the operations of the counter-weight and of the dangers of passing under the counter-weight, and that these open and apparent conditions and operations and dangers were assumed by the plaintiff when he entered defendant's employ and for that reason he cannot hold

the defendant responsible for his injury.

If an employee gets injured while doing something his duty does not require him to do, and he has no order to do, and the same is not done in the performance of his required employment, he has no right to hold his employer responsible for his injury, and if in this case the plaintiff had no occasion to go under the building and was not directed to go under the building and his employment at that time did not require him to go under the building, then he cannot recover in this action and your verdict must be for the defendant.

The law is, in other words, that where a servant in the discharge of his duty in the line of his employment voluntarily goes in a place that he is not required to go, he assumes the risk that attaches to that place.

If you find that the construction under the building and the operations of the counter-weight were the usual constructions and operations, and the same were all open and obvious, then though the plaintiff had some duty requiring him to go under the building, and those directing him did not warn him of the operations of the counter-weight, still if he knew the conditions and the operations of the counter-weight, or if the same were open and apparent [304—244] so that they were observable to an ordinarily careful person, then the plaintiff could not recover, for the law does not require an employer to warn an employee of conditions, operations or dangers when the same are known to the employee or can by ordinary use of his eyes and faculties be

observed by him.

If you find that the space under the building was open and afforded safe passage, except the space occupied by the counter-weight, and though you should find that the plaintiff's duty required him to go under the building, yet if you further find that for some reason of his own he went under the counter-weight knowing that it was above him, or that the same would have been known to him if he had made the use of his eyes that an ordinarily careful man would have made under such circumstances, and that the danger therefrom was or should have been appreciated by him, and instead of his using the open space under the building which afforded safe passage, he cannot hold the defendant responsible for his voluntarily using the unsafe way.

An employer, when he has in his employ a man of experience and of mature judgment, does not have to warn or instruct such employee about the usual operations of a factory, or open and ordinary dangers attendant upon such operations, when the same are open and obvious to such employee. For it is presumed that an employee of experience and mature judgment will observe these things for himself, and as a matter of law in doing his work he is held to assume these ordinary and usual risks and dangers, and if he receives an injury from operations that are usual, [305—245] customary, open and obvious, he cannot complain. If in this case the operations of the counter-weight were usual and customary in work of this kind, and open and obvious, and the danger therefrom was open and ob-

vious, and no duty required plaintiff to place himself in a place of danger under the counter-weight, and if the way under the counter-weight was not a used way and the entire balance of the space under the building was open and safe and plaintiff knew of these conditions, or by the exercise of his faculties should have known them, he cannot recover in this action and your verdict will be for the defendant.

If you find that a vat was to be let down into the wharf outside of the building, and the measurements were to be made outside of the building, and that Mr. Cornils took plaintiff to the place outside of the building and showed the plaintiff where to make the measurements, and directed him to tear up a plank in the wharf to find the supporting timber from which to make the measurements, and gave him no order to go under the building, and did not know that he would attempt to make the measurements by going under the wharf from under the building, and that plaintiff, notwithstanding these directions from Mr. Cornils, if you believe he so directed the plaintiff, of his own volition went under the building because he believed he could more easily make his measurements in that way, then by the plaintiff's failure to follow the directions of Mr. Cornils and assuming to do the work in his own way, his injury would be the result of his own fault [306—246] and the defendant would not be responsible therefor, and your verdict should be for the defendant.

The Court instructs you that before the plaintiff

is entitled to recover in this action he must prove all the material allegations of his complaint by a fair preponderance of the evidence. By preponderance of evidence is meant by the greater weight of the evidence; that is, the evidence most convincing to your minds, and in determining upon which side of the case the evidence preponderates, you should take into consideration all the facts and circumstances testified to on the trial, the apparent fairness or lack of fairness of any witness, the interest or lack of interest of any witness, and the apparent fairness or candor with which the witnesses testified, their demeanor on the witness-stand and all the facts and circumstances surrounding the trial, and from all the evidence and the facts and circumstances you are to determine upon which side the evidence preponderates. If the plaintiff fails to prove his case by a fair preponderance of the evidence, then your verdict should be for the defendant.

You are instructed that for the plaintiff to recover it is necessary for you to find that the evidence preponderates in favor of the plaintiff that his injury was caused by defendant's negligence as plaintiff has alleged it. By preponderance of evidence is meant such evidence as is more convincing to your minds, and in this case if, after hearing all the evidence, your mind is not more convinced in favor of plaintiff that his injury was caused by defendant's [307—247] negligence as he alleges it, that is, if your mind is left evenly balanced as to whose contention is right, then plaintiff would not

be entitled to recover and your verdict should be for the defendant.

You are instructed that in this case if you believe from the evidence that the plaintiff was an experienced man in the line of work in which he was engaged on the day of his alleged injury, and was familiar with the risks and dangers incident to such work, if any such existed, and if you further find from the evidence that the injury to plaintiff occurred through the happening of an event ordinarily incident to such line of work, then the plaintiff assumed all the risk of such injury when he entered upon such employment and he cannot recover in this cause.

You are instructed that where a servant is guilty of negligence himself, or fails to exercise ordinary care and caution, and such negligence or such failure to exercise ordinary care and caution contributed to his injury to such an extent that the accident would not have occurred but for such negligence of the servant or failure to exercise ordinary care and caution, then the servant is guilty of contributory negligence and cannot recover.

You are instructed that if you believe from the evidence that the plaintiff in going about his work chose to go about it and chose to remain in such place as would subject him to injury, and that his acts were not those of an ordinarily careful and prudent person under the circumstances, and that this want of ordinary [308—248] care on his part contributed to his injury, then said plaintiff was guilty of contributory negligence and he is not en-

titled to recover in this case and your verdict should be for the defendant.

You are instructed that if you believe from the evidence in this case that there were two ways or methods of doing the work in question at the time plaintiff claims to have been injured, one of which methods was safe and the other dangerous, and both of them and the dangers of the one way were open and apparent to plaintiff, and that he voluntarily chose the dangerous way and was injured, then he is guilty of contributory negligence and cannot recover in this case.

In that instruction I stated to you "the dangers of the one were open and apparent." By that I mean the one way which he chose and in which he was injured.

You are instructed that the master does not owe any duty to a servant to warn him of dangers which are open and apparent, and as readily observable by the servant as by the master, and if in this case you should find from the evidence that the counter-weight and the uprights upon which it operates were in plain view, and its condition open and apparent, and the plaintiff by the exercise of his faculties and ordinary care could have avoided the injury from said counter-weight, then you are instructed to find a verdict for the defendant; and in connection with that instruction I instruct you that a servant in going about in the performance of his work has the right to assume that the master has discharged the duty that he owes him with ordinary care. [309—249]

In this case there has been evidence that the men who fixed the cable after it broke laid down planks on each side of the counter-weight space to stand on, and it is argued that this constituted an invitation to Godo to use that way at the time he was injured. In regard to this matter you are instructed that unless you find that the defendant or its officers, or those in charge of its business, knew that the planks had been so laid or from all the circumstances should have known it, then the defendant would not be charged with knowledge of this situation and would not be charged with having invited the plaintiff to use this way. And though you should find against the defendant on this point, yet if you should further find that the plaintiff thoughtlessly and carelessly and without taking the precautions that an ordinarily prudent person would take, placed himself in a known dangerous position or in a position that from the use of his eyes and faculties he should have known to be dangerous, and that if it was his carelessness and negligence and failure to act as an ordinarily prudent person would have acted that caused his injury, then he cannot recover.

If under the evidence and these instructions you find the issues in this case in favor of the plaintiff, it will then be your duty to fix upon the amount of damages that he shall recover in the case. He should only recover, if you find the issues in favor of the plaintiff, on account of those injuries that he has suffered as the direct result of the defendant's negligence. In fixing this amount you may take into consideration [310—250] his age, his earn-

ing capacity and the nature and character of the injuries, if any, that the evidence has shown you he has suffered. You may take into consideration the pain and suffering which the evidence shows that he has endured as a direct result of any injury caused by the defendant's negligence. Before you could allow him anything on account of the permanency of the injury or future suffering the evidence must have shown with reasonable certainty that his injuries or some of them were permanent, or with reasonable certainty that he would suffer in the future. You will award him then such an amount as in your sound discretion you consider will fairly compensate him for the injuries he has suffered and no more, uninfluenced either by sympathy or prejudice.

You are in this case, as in other cases of fact tried to the jury, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and credibility of the witnesses and in arriving at the facts, and in passing upon the weight of the evidence and the credibility of the witnesses, you will resort to all of the tests that your experience has taught you to be safe and reliable in arriving at the truth in human transactions. The law says you shall weigh and take into consideration certain things in this case; but does not undertake to enumerate them all. And as I instructed you in one of these written instructions you should consider the candor, apparent candor and demeanor of the witness in giving his testimony; whether the witness testified fairly and [311—251] openly

and freely and frankly as you would expect a witness to do who is trying to tell the exact truth, and no more and no less, or whether the witness is evasive, reluctant and hesitates and has to be repeatedly questioned to get him to tell what he knows; and also whether the witness may not be too swift and too free and answers before he is asked a question or answered more than he is asked. You will also take into consideration the situation in which each witness was as enabling him to see and know the things about which he undertakes to tell you. You will consider the testimony of each witness by itself, whether it is reasonable and probable, and whether it is contradicted by other testimony which you believe or whether it is corroborated by other testimony in the case. You will also take into consideration the interest any witness is shown to have in the case, either in the manner in which he gives his testimony or his relation to the case. The plaintiff having testified in his own behalf, you should apply to his testimony the same rule you would to that of other witnesses in the case, including his interest in the result of the case.

You will disregard any remarks of the Court on the weight of the evidence or comments on the evidence, if any have been made, as you are the sole and exclusive judges of every question of fact in the case, and you will disregard any comment or statement of counsel that is not supported by your recollection of the testimony. The case is to be tried on the testimony.

The Court will submit to you two forms of verdict,

[312—252] one finding for the defendant generally, and one finding for the plaintiff. In the latter there is a blank left for the amount at which you assess his damages in case you find for the plaintiff. When you have arrived at a verdict you will cause whichever one of these forms agree with that verdict to be signed by your foreman, and if for the plaintiff have that blank filled out with the amount which you assess as his damages, and apprise the bailiff of the fact you have agreed and return that verdict into court.

(Jury retire.) [313—253]

Exceptions.

Mr. EVANS.—If the Court please, I want to call your attention to the addition you made to our request 15, that is, you instructed them that the employee in going to and in the performing of his work has the right to assume that the master has discharged the duty that he owes him, as being misleading when read in the light of the other instructions, in that it was not qualified by stating to him—by requiring the servant to use his faculties even in the presence of danger.

Mr. FLETCHER.—I want to add to that exception Mr. Evans has spoken of. That is, that the negligence complained of in his case is the failure to warn. By that instruction you say that the plaintiff can assume we have not failed to warn him. It seems to me it is confusing.

The COURT.—Your instruction was confusing by putting it on the same footing, when they are not that way. I qualified it to counteract that.

Mr. FLETCHER.—That exception your Honor will allow us.

I desire to except to the instruction given in substance as follows, that the master owes a positive duty to provide the employee with a reasonably safe place to do his work, on the ground there is no evidence or circumstances in the case to justify that instruction, and it is misleading and confusing to the jury.

We also desire to except to the Court's instruction [314—254] reading as follows:

“The Court has instructed you that it is a duty of the master to provide the servant with a reasonably safe place in which to do the work he is employed to do. If, on account of changes in the construction of the master's premises and appliances, the servant's place of work ceases to be reasonably safe, and is made by the master unreasonably and unnecessarily dangerous, and the master knows of the danger or should in the exercise of ordinary care in the performance of his duty know of such dangers, and the servant did not know of the changed condition and did not appreciate the danger therefrom, and could not by the exercise of reasonable diligence know such dangers, the master should give the servant such warning of the hidden dangers so created as an ordinarily careful person would give under all the circumstances to render the servant's place of work reasonably safe, and if such master negligently fails to give any warning, and such failure is the proximate cause of the servant's injury, the master is liable, unless the injury was contributed to by the servant's

own negligence or want of ordinary care. If the changes made and the dangers arising therefrom are open and obvious and observable by one of the age, intelligence and experience of the servant in the exercise of ordinary care for his own safety, the master would be under no duty to warn the servant, and would not be negligent in failing to warn the servant."

We also except to the Court giving the instruction asked by the plaintiff (Plaintiff's requested [315—255] Instruction Number 4), as modified by the Court, and reading as follows:

"If you find from the evidence that the plaintiff was instructed to make the measurements from under the wharf or building, then you are instructed that he could proceed, unless otherwise directed by his employer or the representative of his employer, in the way and course that an ordinarily prudent and cautious person would proceed, having the opportunity for observing and the knowledge of the dangers of the place of the accident, that you find that the plaintiff had at the time of the accident, and if you find that he did proceed with his work as an ordinarily prudent and careful person would proceed under all the circumstances, then you are to find that the plaintiff was not guilty of contributory negligence."

We desire to except to the Court's refusal to grant our first instruction, which was for a directed verdict, which instruction reads as follows:

"You are instructed to return a verdict in this cause in favor of the defendant."

The COURT.—Exception allowed.

Mr. TEATS.—I have no exception now. I suppose those that are refused, we can have our exceptions for those any time.

The COURT.—Yes, sir. [316—256]

[Order Letting Bill of Exceptions.]

United States of America,
Western District of Washington.

Now, on this 27th day of January, 1913, the above cause coming on for hearing on the application of the defendant to settle the Bill of Exceptions in said cause, defendant appearing by its attorneys Messrs. Fletcher & Evans, and the plaintiff appearing by his attorney Messrs. Teats, Metzler & Teats, and it appearing to the Court that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiffs within the time provided by law, and that no amendments have been suggested thereto and that counsel for plaintiff have no amendments to propose, and that both parties consent to the signing and settling of the same, and that the time for settling said Bill of Exceptions has not expired; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, together with the exceptions thereto, and all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said Bill of Exceptions and the Clerk of this Court is hereby ordered and instructed to attach the same thereto;

Thereupon, upon motion of Fletcher & Evans, attorneys for defendant, it is hereby

ORDERED that said proposed Bill of Exceptions be and the same is hereby settled as a true Bill of Exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the Clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

EDWARD E. CUSHMAN,

Judge. [317]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, in pursuance of the command of the Writ of Error within, herewith transmit a true copy of the record and all proceedings in the case of Louis Godo, plaintiff and defendant in error, vs. Carstens Packing Company, defendant and plaintiff in error, lately pending in the United States District Court for the Western District of Washington, Southern Division, as required by the stipulation of counsel filed in said cause, as the originals thereof appear on file in said court.

I further certify and transmit the original exhibits in this cause, as well as the original Writ of Error and original Citation herein.

And I do further certify that the cost of preparing and certifying said transcript amounted to the sum of \$127.50, which sum was paid to me by the attorneys for the plaintiff in error.

Attest my official signature and the seal of this Court, at Tacoma, in said District, this twenty-seventh day of February, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk. [318]

[Endorsed]: No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Carstens Packing Company, a Corporation, Plaintiff in Error, vs. Louis Godo, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Received March 7, 1913.

F. D. MONCKTON,

Clerk.

Filed March 13, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Judicial Circuit.*

CARSTENS PACKING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

Writ of Error.

The United States of America,
Western District of Washington,—ss.

The President of the United States of America, to
the Honorable Judges of the District Court of
the United States for the Western District of
Washington, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment, of a plea which is
in the said District Court, before you, or some of you,
between Louis Godo, plaintiff, and Carstens Packing
Company, a corporation, defendant, a manifest error
hath happened, to the great damage of the said
Carstens Packing Company, defendant, as by his
complaint appears, we being willing that error, if
any hath been, should be duly corrected, and full and
speedy justice done to the parties aforesaid in this
behalf, do command you, if judgment be therein
given, that then under your seal, distinctly and
openly, you send the record and proceedings afore-
said, with all things concerning the same, to the
United States Circuit Court of Appeals for the Ninth

Judicial Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit, on the 22d day of March, A. D. 1913, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this twentieth day of February, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk.

[Endorsed]: Original. In the District Court of the United States for the Western District of Washington, Tacoma. Writ of Error.

No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Received Mar. 7, 1913. F. D. Monckton, Clerk. Filed Mar. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

*In the United States Circuit Court of Appeals, for
the Ninth Judicial Circuit.*

CARSTENS PACKING COMPANY, a Corpora-
tion,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

Citation.

United States of America,
Western District of Washington,—ss.

To Louis Godo, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said circuit, on the 22d day of March, A. D. 1913, next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, wherein Carstens Packing Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, this 20th day of February, A. D. 1913.

[Seal]

EDWARD E. CUSHMAN,
United States District Judge for the Western Dis-
trict of Washington.

[Endorsed]: In the District Court of the United States for the Western District of Washington, Tacoma. Carstens Pkg. Co., Plaintiff in Error, vs. Louis Godo, Defendant in Error. Citation.

No. 2253. United States Circuit Court of Appeals for the Ninth Circuit. Received Mar. 7, 1913. F. D. Monckton, Clerk. Filed Mar. 13, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

CARSTENS PACKING COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

Stipulation [Waiving Printing of Original Exhibits.]

It is hereby stipulated and agreed by and between the parties to this action by their respective attorneys that the original exhibits, which have been forwarded to the above-entitled court on appeal in this cause, need not be printed, but may be considered by the Court.

FLETCHER & EVANS,

Attorneys for Plaintiff in Error.

TEATS, METZLER & TEATS,

Attorneys for Defendant in Error.

[Endorsed]: No. 2253. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Carstens Packing Company, a Corporation, Plaintiff in Error, vs. Louis Godo, Defendant in Error. Stipulation. Filed Mar. 24, 1913. F. D. Monckton, Clerk.

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In the United States Circuit Court of Appeals for the Ninth Circuit

CARSTENS PACKING COMPANY,
a corporation,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

No.

Brief of Plaintiff in Error

Upon writ of error from the United States District Court for the Western District of Washington, Southern Division.

STATEMENT OF THE CASE.

The Plaintiff in Error, Carstens Packing Company, is a corporation owning and operating a packing house in the City of Tacoma. On the 27th day of May, 1911, and for many years prior thereto, the Defendant in Error, Louis Godo, was in the employ of the Plaintiff in Error as a carpenter and millwright, his duties taking him all over the plant in new construction and repair work and bringing him constantly in the vicinity of various kinds of machinery and appliances used in that factory. Godo,

at the time of the injury hereinafter referred to, was 53 years of age and had been a carpenter and mill-wright for many years. As a part of the plant the defendant operated a building called the "wool-pullery." In this "wool-pullery" was an elevator which operated from the fifth to the first floor. To the right of the elevator and a few feet from it was a shaft consisting of two uprights with the necessary tongues on each of said uprights, which constituted the track in which the counterweights of the elevator operated. Beneath said "wool-pullery" building, which is located on the tide flats in said city of Tacoma, there was a distance of from four to seven feet from the floor to the mud flats, and these two uprights, or guides, for the elevator counterweights extended from the top of the building down through the building entirely to the mud flats below.

The foundation or wall of the "wool-pullery" building extended clear down to the mud flats. Immediately outside of the "wool-pullery" building and joined on to said building is a wharf. Defendant in Error testifies that on the 27th day of May, 1911, he was ordered by the master mechanic of Plaintiff in Error *to go under the wharf and take a measurement to locate a tank.* (Trans. of Record, Page 67, 95, 99.) That he did not know how to get under the wharf. (Trans. of Record, page 67, 68.) That he made no inquiry. (Trans. of Record, page 97.) That he had been under the building before

constructing a foundation or forms for a foundation for a wringer under the "wool-pullery" building. (Trans. of Record, page 77 and fol.) That when going under the building at such times as he had been there before he had gone under on the side of the building some distance away from the elevator and on a different side of the building from the elevator through a door or opening which was left there for that purpose. (Trans. of Record, page 61-81.) That when he was ordered, as he testifies, to go under the wharf and take this measurement he knew the foundation of the building extended to the mud flats (Trans. of Record, page 98) and if he took the measurement from under the building it would be necessary for him to cut a hole through the foundation or wall of the building and put a pole through such opening so to be cut extending the pole over to the cap, which was a considerable distance outside the building, the distance to which he desired to ascertain. (Trans. of Record, page 98.) He further testifies that the elevator and the counterweight are the only obstructions under the whole building. That otherwise the entire space under this "wool-pullery" is open, except that over in a far corner is a tank and at a distance of some fifteen to twenty feet from the elevator is the wringer foundation upon which he worked. (Trans. of Record, page 94-95.) He further testifies that prior to the accident the counterweight, when the elevator

was operating, only came down to the level even with the first floor and did not go below the floor. (Trans. of Record, page 89-90.) Also that the guides or track on which the counterweight operated extended down to the mud flats clear through from the top of the building. (Trans. of Record, page 101, 107.) That sometime prior to the date of the accident the cable which was attached to the counterweight and operated it had broken loose from the counterweight. (T. of R., page 83, 111.) That the same had been repaired. (T. of R., page 111.) That the usual way to repair it would be to take a wind of the cable off the drum at the top of the elevator and thus lengthen out the cable and re-attach it to the counterweight (T. of R., page 111.) Knowing that the cable operating the counterweight had broken and had been repaired; knowing the usual method of repairing the same, being a millwright of many years experience, and having worked around this very plant for many years, when Defendant in Error, as he says, was ordered to go under the wharf to take a measurement, not knowing how to get under the wharf, without asking any questions of anybody, and seeing an opening where the siding had been taken off the side of the building, right by the side of the elevator, he procured a chisel and hammer and crawled under the building,—not under the wharf—knowing that some repairs had been made on the cable that oper-

ated the counterweight; knowing that the counterweight had broken from the cable; knowing that the counterweight weighed approximately 1700 pounds; it being light enough that he could see the guides or uprights extending from the first floor of said building down to the mud flats; knowing that the whole area under the said "wool-pullery" building was open excepting the place he chose, and knowing that he had never entered at this particular place, and having been under said building on several occasions before, Defendant in Error went to the space left open between the guides or uprights constituting the track of the counterweight and stooped over, lighted a match to hold out ahead of him to observe his surroundings and while stooping over immediately under said 1700 pound weight, the cable carrying which he knew had broken and had been fixed, and knowing the usual way of repairing the same, which was the method followed in its repair, the counterweight came down and crushed him causing his injuries. Thus far in this statement we have stated only what the Defendant in Error himself testified to.

The counterweight cable was repaired by two men, Byers and McArthur. They testify, merely on their recollection, that the repair was made only a few days before Godo was hurt, but the foreman in charge of these men, who kept the time book, made a practice of making entries in his time book

as to where and when the various men worked in order that the charges for such work might be made to the proper department. This time book shows, and it is not contradicted, that the counterweight cable broke and was repaired about the middle of January, 1911. (See page dated 1-21-1911 of Plaintiff in Error's Exhibit 10, same being opposite page on which appears clerks file mark, also T. of R., page 224 and fol.) The evidence of Byers and McArthur being purely from memory and almost two years after the accident and the time book not being discredited in any respect it cannot be disputed successfully that the counterweight cable was repaired in January, 1911, and from that time on down to and succeeding the time of the accident in May, it let the counterweight come down below the floor in the same manner that it did on the day of the accident. In the month of April or the latter part of March, 1911, Defendant in Error was working under the building, building forms for a wringer foundation. He could see all the surroundings and conditions and testifies that he sat upon a box within 18 feet of the counterweight for approximately half an hour waiting to begin his work. Thus it will be seen that he worked in close proximity to the counterweight after its change and he admits on cross-examination that if the change was made before he built the forms for the wringer foundation it was his duty to see it and that he could

have seen it. (T. of R., page 90, 101 and fol.)

Defendant in Error's only complaint or allegation of negligence is that the master mechanic failed to warn him of the danger of being struck by the counterweight *under the building*, when he ordered him, as Defendant in Error testifies, *to go under the wharf*.

Defendant in Error testified that the "wool-pullery" house was built in 1906 and that he helped install the machinery. (T. R., 57-62.) He saw the counterweights operate after they were installed; that they came to six inches above the joists under the first floor and weighed seventeen to eighteen hundred pounds. (T. of R., 63-34.) He boarded these weights in between the first and second floor. (T. of R., 64.) He worked on the wringer foundation near these weights between the 15th and 20th day of April, 1911, and at that time the weights came to the floor above. (T. of R., 67.) That on May 27th, 1911, Mr. Cornils told him to go under the *wharf* and get measurements for a tank which was to be let into the wharf outside of the "wool-pullery" house. (T. of R., 67.) That he could not get under the wharf so he and his partner got a chisel, hammer and a pole about 20 feet long and went under the building; *that no one told him to do this* but he thought that he would cut a whole in the side of the building from under it and stick his pole through and ascertain the distance

from the building to the cap under the wharf so as to make his measurements for the tank which was to be let into the wharf outside of the building between this cap and the building. *That all under the building was open and he could have gone around the space between the grooves through which the counterweights operated* but that it was muddy under the building and he took the shortest way which lead him through these grooves; that he stopped between the grooves, within which a 1700 pound weight operated above him, to light a match in order to see what was beyond and that at that time the weight came down in the regular operation of the elevator and hit him; *that he had never gone that way before and knew of no one ever having done so.* (T. of R., 69-91-93-94 to 97.)

One page 94 of the Transcript of the record he testifies as follows:

“Q. Wasn’t it open so that you could go right straight ahead?

A. It was open, but, my God! the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can.

Q. It was dirty under there—you know under that packing-house it was just tide-flats and soft mud?

A. Certainly.

Q. And you could have gone straight ahead and gone around the elevator shaft entirely, couldn’t

you?

A. I could have gone out that way by going 20 feet more—15 feet more.

Q. Looking at your plat here, you stated that you came in right there where the letter H is.

A. Yes, sir.

Q. You came down here to where the counter-weights are and started under?

A. Yes.

Q. You could have come right straight ahead and climbed over that studding, gone right straight and around to your point of labor, couldn't you, that you intended to go to?

A. I could do it.

Q. You could have done that, that was open?

A. That was open.

Q. And you could see it?

A. Yes, I could see it.

Q. You knew there was no counter-weights or anything else over there?

A. I did.

Q. Now, nobody told you to go under the counter-weights, did they?

A. They did not. *They told me to go under the wharf.*

Q. They told you to go under the wharf?

A. Yes.

Q. You do not know of any work being done under that packing-house over on the side beyond

the elevator shaft, along the wall adjacent to the new tank, do you, prior to that time?

A. No, sir.

Q. The only work that had been done under there at all was to put in this big vat over to the other side of the packing-house, wasn't it, and this wringer foundation?

A. Yes, sir.

Q. That was the only thing that would occasion any men to go under there at all?

A. Have to go under there to draw the water out the washer.

Q. You have never been under there at all yourself?

A. Never under there.

Q. Did you know of anybody that had been over there?

A. I did not.

Q. Did you know of any occasion that anybody would have to go in there?

A. Not to my knowledge.

Q. Did you know whether or not you could go under the wharf there at all?

A. I knew I could go through there by cutting a hole in the plank.

Q. Did you have anything with you to cut that away?

A. Yes.

Q. What did you have?

A. I had a hammer and chisel.

Q. You took a hammer and chisel and a pole twenty feet long?

A. Yes.

* * * *

Page 97.

Q. What you were to do was to get the measurement from the building, from the foundation, over to this cap?

A. Over to that cap; yes.

Q. You say he told you to go under the wharf?

A. Yes.

Q. Why didn't you go under the wharf?

A. I could not go under the wharf.

Q. *Did you tell anybody you could not go under the wharf?*

A. *I did not.*

Q. You did not?

A. No.

Q. You went this same way because that suited your convenience to do that work that way, did you?

A. I had to do it because I always had to do what I was told.

* * * *

Page 98.

Q. You knew you could not get under the wharf at all, didn't you?

A. Not at the place I tried to first, but I knew

I could get a measurement by cutting a hole in the building over on that side.

Q. Over on what side?

A. On the north side of the building.

Q. Was that the only place you could cut a hole through?

A. By going under the wharf.

Q. It was the only place under the whole building where you could do that?

A. Well, I had to go to the place where I could make the measurement, that is the certain place where that plank was situated.

Q. You had never been there?

A. I ain't, but I know I could get through.

Q. But you did not know whether you could get through there or not?

A. I know I could not get through there unless I cut a hole in the wharf.

* * * *

Page 101.

Q. It was daylight when you went under there, wasn't it?

A. At that time it was light.

Q. There was a hole the light came through?

A. Yes, there was a hole the light came through.

Q. And you could see the general surroundings?

A. Yes.

Q. You could see that was the place where the counterweight run?

A. Yes.

Q. You could see the grooves on the plank, on the side of the counterweight shaft?

A. I could not see the grooves, but I could see the lead taps.

Q. You knew that was the counterweight track?

A. Yes.

Q. You could see generally the place right ahead of you?

A. I could.

Q. You knew it was all open under there with the exception of that space, didn't you?

A. Yes.

* * * *

Page 107.

A. I did not know the counter-weights run down, but I seen the guides.

Q. Were the guides there too?

A. Yes, sir.

Q. Was there anything there to indicate that the counter-weights came down?

A. Not that I could see.

* * * *

Q. They were there before you were hurt?

A. They were there.

Q. Never been any change in them, so far as

you could see?

A. No, not as far as I can recollect.

Q. Just the same clear up and down, they ran clear down in the mud?

A. Yes.

Q. Now, what do you suppose they put those guides there for?

A. That is more than I can tell you. Have them there to run the counter-weights on.

* * * *

Page 110.

Q. You knew that the counter-weight had fallen once—you knew the cable broke once and let the counter-weight down?

A. I knew the cable broke, but I did not know the counter-weight come down there or not when it was fixed.

Q. You knew if the counter-weight broke it would come down, if the cable broke?

A. I expect so.

Q. You knew it had broken.

A. I expected it had, yes.

Q. You knew it would be dangerous to be underneath if it broke again, didn't you?

A. I knew it would be dangerous; yes.

Q. You knew at the time you went under there, or started to go through there, you knew the counter-weight had broken and come down?

A. I knew the cable was fixed, yes.

Q. You knew the cable had broken and the counter-weight come down, did you not?

A. Yes.

Q. And yet you went through there or tried to?

A. How?

Q. Yet you tried to go through?

A. It was fixed when we tried to go through there.

Q. You knew there had been some change made there?

A. *I knew there had been a change made or they had fixed it.*

Q. You knew it had been fixed. Now, what would be the simplest way to fix it?

A. Raise the weight up to its place again where it was, or else tie on to your weight where it was, and then board up the hole so that nobody could come up into dangers.

Q. Wind off the drum one wrap of the cable, and connect the cable with the weights and then wind it on, if that could be done, that is the way to do it, isn't it?

A. That is the way to do it.

Q. Yes.

* * * *

S. P. Byers, a witness for the defendant in error, testified, page 21, transcript of record as follows:

Q. Do you know whether or not he (defendant

in error) knew that you had fixed the counterweight?

A. Yes, he knew that I was working at it.

Q. Did you ever see Godo under the building near where the counterweight operated?

A. You mean at any time?

Q. Yes.

A. Yes.

Q. How many times?

A. I couldn't say.

Q. More than once.

A. Yes.

Nels Olson, a witness for the defendant in error and who was with him when he was injured testified on page 127, transcript of record as follows:

Q. That packing house was all open under there with the exception of the shaft?

A. Yes.

Q. Now as a matter of fact it was muddy all underneath there?

A. Yes.

Q. And wet?

A. Yes.

And on page 128 as follows:

Q. Did you ever know of anybody going under that packing house at the place you went under?

A. No sir.

Q. Did you ever know of anybody going under there and under these counterweights too?

A. No, sir.

Q. Did it have the appearance of anybody having gone in there, that you can tell?

A. No, sir.

* * * *

Q. Was there anything said there at that time?

A. Pete said 'for God's sake, why didn't you tear up the planks instead of going underneath the building?' Pete said to him.

Q. That was when you brought him out from under the building?

A. After he was sitting on a plank.

This witness testified that after the injury to the defendant in error he, the witness, made the measurements by taking off a plank in the wharf outside of the building. (T. of R., 136-137.)

Wm. McArthur, a witness for the defendant in error, testified that he thinks he and Byers repaired the cable on the counterweight the last of April or the first of May but it may have been earlier. (T. of R., 149.) *That they repaired the cable in the usual and proper way.* (T. of R., 153.)

H. E. Hansen, a witness for the defendant in error, testified on page 156 of Transcript of Record as follows:

Q. Did you see Godo (defendant in error) and Pete Cornils just before this accident?

A. Yes.

Q. Where?

A. Mr. Cornils at a bench, and Godo was over there. They worked over there and had a bench. I do not know what he done because that was not my business to attend to what he did, and I had nothing to do with them, but they were working on that bench there. I was putting a pipe in. I was down to put my brace and screw-driver away. I was just by the corner and at my box. Cornils came along and said to Louis, "*I want you to go with me and take measurements,*" and he walked out. That was all it was.

Mr. Cornils, foreman of plaintiff in error, testified that the wringer foundation which is under the building and near the counterweight and upon which the defendant in error worked for several days was put in after the cable was repaired. (T. of R., 176.) That the change in the cable was made in January, 1911. That defendant in error worked on the wringer foundation near the counterweight in April 1911 and was injured on the 27th of May 1911 and this witness on page 177 testified as follows:

Q. Was that vat to go into the building or outside of the building?

A. The vat was to go outside of the building.

Q. Did you give Mr. Godo any instructions in reference to the placing of that tank and making measurements for it?

A. I had the tank there; it was too long. I told Mr. Godo to take up this plank, get a peevy and take up that plank, and find the girder there and take the measurements from that girder, and cut down the tank to fit it.

Q. Did you show him the plank you wanted him to take up?

A. Yes, sir.

Q. Were you standing there close to the plank?

A. Yes, standing very close by when I told him to take up the plank.

Q. Did you at any time tell him not to take up the plank or Tom would give him hell?

A. No, sir.

Q. Did you ever make any similar remark of that kind to him?

A. No, sir.

Q. Did you ever indicate to him he was not to take up the plank?

A. No, sir.

Q. Did you know that he was going under the glue-house to attempt to make the measurements for that tank?

A. No, *I did not.*

Q. *Did you ever direct him to go under the glue-house or wharf?*

A. No, sir.

* * * *

Q. What was said between you and Godo, if anything?

A. Well, I stepped up there; my first impression was, I said, "For God's sake! What did you go under there for? Why didn't you take up the plank as I told you?"

* * * *

Q. What did Godo say?

A. He said, as much as I understood it, I do not know why I did it.

Q. He said something to you?

A. That is the expression I understood from him, I do not know why I did.

Q. I think I asked you, you superintended the building of the glue-house originally? You were there and superintended the original construction of the glue-house?

A. Yes, sir.

Q. You knew the foundation went clear down to the mud?

A. Yes, sir.

Mr. H. B. Clark, witness for plaintiff in error, testified on page 201 of Transcript of the Record as follows:

Q. You got down there very soon?

A. Immediately.

Q. Mr. Clark, I will ask you if Peter Cornils was there?

A. Yes, sir.

Q. I will ask you whether you heard any conversation or remark made by Cornils to Godo at that time?

A. I did.

Q. What was it?

A. As near as I can remember Mr. Cornils explained to Godo something like this: "What in the world were you doing under there?" or you have no business there, something to that effect.

Q. Do you recall what if anything Godo said in reply?

A. Why, I do not.

Q. You do not pretend to repeat the exact words of the exclamation?

A. No, sir.

Q. That is the substance so far as you are able to recall it?

A. Yes, sir.

Chas. S. Lundgren, a sub-boss and timekeeper for plaintiff in error testifies that the counterweight was repaired *on the 16th and 17th days of January, 1911*, which was prior to the time defendant in error worked on the wringer foundation near this counterweight, which work was done in the following April. (T. of R., 224.) That he kept the time and indentified his time book which has an entry of this work on page dated 1-21-1911 and marked with the clerk's file mark of Exhibit 10. (T. of R., 225 et seq.)

The only complaint or charge of negligence is that plaintiff in error should have warned the defendant in error of the danger of being struck by the counterweight under the *building*, defendant in error having been instructed to make measurements by going under the wharf, as he testified, without any one knowing that he intended to go under the building, without any directions so to do, and it being admitted that no one had ever been known to pass under the counterweight space, the entire under part of the building being open and affording free access and there being no reason for passing under the counterweight except that the defendant in error claims that it was a shorter and perhaps a more convenient passage, it also being known both to the foreman who gave the directions and to the defendant in error that the side of the building extended to the ground and there was no way to get under the wharf by going under the building. There was no complaint that the elevator or counterweight were in any manner defective. It was known that the counterweights had been repaired and that the proper and usual way to make such repair was to lengthen the cable and that the elevator was then in its usual and ordinary operations. No one knew or had reason to know that the defendant in error was even intending to go under the building much less attempt this dangerous passage under the counterweight.

ASSIGNMENT OF ERRORS

The errors committed by the lower court upon which the Plaintiff in Error (defendant below) relies for reversal of this action are as follows:

I.

The court erred in denying the motion of defendant (plaintiff in error here) for a non-suit in this cause made at the close of the plaintiff's case in chief. Said motion being made upon the following grounds:

- (1) That plaintiff has failed to prove a cause of action as laid in his complaint.
- (2) That there is an absolute failure of proof of any negligence on the part of the defendant.
- (3) That the accident was due to contributory negligence and want of due care and caution on the part of plaintiff.
- (4) That the condition was open and apparent and plaintiff assumed whatever risk there was.

(T. of R., 44-171.)

II.

The court erred in refusing to grant defendant's first requested instruction for a directed ver-

dict. Said requested instruction appearing in bill of exceptions, page 256 and being as follows: "You are instructed to return a verdict in this cause in favor of the defendant." (T. of R., 25-44-292.)

III.

The court erred in denying defendant's petition for a new trial of this cause. (T. of R., 40-41-47.)

ARGUMENT

All of the assignments of error argued raise the same question as to the sufficiency of the evidence to justify the verdict, contributory negligence on the part of the defendant in error and that he assumed the risk. We, are, therefore, arguing them as one assignment.

Under the facts as detailed above would the master owe a duty to this servant to warn him? The law requires the master to warn an inexperienced servant of the dangers of his employment which are not obvious, open and apparent to such inexperienced servant. This rule, however, can have no application in the case at bar for Defendant in Error was accustomed to working around machinery—a millwright of many years experience—and had been in this factory, around its machinery, for many years.

In *Labatt on Master and Servant*, at Section 438 we find the following:

"The principle that a servant, when he is

directed either by his master, or by a fellow employee under whose control he is placed, to perform a certain piece of work, or to perform it in a certain place, will ordinarily be justified in obeying the orders so given without being necessarily chargeable with an assumption of the risks incident to the work, has been recognized in several cases. For practical purposes, however, this principle is not of much importance, *as the ultimate question to be determined* in this as in all other classes of cases when the defense of an assumption of the risk is put forward is simply whether the servant had knowledge actual or constructive of that risk and encountered it without being subjected to what the law regards as coercion.”

The same author in Section 433 in discussing the question of orders given by a superior to a servant has the following to say:

“***As a condition precedent to establishing his right to recover for an injury, on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

- (1) That an order was given.
- (2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.
- (3) That the act which led to the injury

was done in obedience to the order.

- (4) That the order was a negligent one under the circumstances."

Now let us briefly analyze the situation and see whether in the light of the evidence of Defendant in Error, these conditions have been met. Defendant in Error testifies that he was ordered to go under the wharf; that he did not know how to get there; that he made no inquiry; that he had been under the building before; that he knew where the elevator was; that he knew where the counterweight operated; that he knew the guards or track for the counterweight extended down to the mud flat; that the cable which operated the counterweight had broken; that it weighed approximately 1700 pounds; that it had been repaired; that the manner in which it was repaired was the usual and ordinary way; that practically all the space under the whole building was open excepting the elevator space and the counterweight space. These things were actual knowledge possessed by the Defendant in Error. He was a man of many years experience as a millwright; had worked around this plant for many years and must have known the danger from this counterweight. Under these circumstances could the master be expected to know that this experienced millwright would do so fool-hardy a thing as to place himself in this situation of danger? The Defendant in Error knew that the cable had broken; that the counter-

weight fell; that it had been repaired, yet knowing these things and knowing that the usual manner of making this repair was the identical way that it was repaired, he stands between the two uprights until the counterweight hits him. For the sake of argument let us suppose that the cable had again broken and the weight had fallen and injured Defendant in Error, could it be said that he was not guilty of contributory negligence, or that he did not assume the risk of injury?

For the sake of argument let us suppose that Defendant in Error, an experienced man, applied to the Plaintiff in Error for a position as millwright, his duties as such would carry him all over the plant, and suppose, being a new employee, he was *really ordered to go under this building*, instead of under the wharf, and could observe the conditions as Godo did observe them, should the master anticipate that this old experienced man would go immediately under and between the two uprights, constituting the guide and track of the counterweight, and stand there knowing the elevator was being operated, and knowing that these guides were put there for the counterweight to operate on? We do not believe that any master would be required to warn any servant under that condition. But they say it was a changed condition. In examining the cases in the books we fail to find any case where the facts are parallel to this one. The doctrine which has grown

up requiring the master to notify the servant of a change of an appliance, which would make it dangerous without such warning to the employee, is confined exclusively in almost all the cases to where the employee worked in a new location or with a specific machine or appliance, not to a man who is supposed to be an expert experienced man working around machinery and whose duties call him to every part of the buldings and in close proximity to every kind of machinery.

It is a well know rule that an employer cannot be held liable for failure to warn a servant unless the necessity for such warning be evident to the master, otherwise the master is justified in assuming that the servant understands the dangers and would take appropriate means to guard himself.

As the order was given to "*go under the wharf*" can it be assumed that the master mechanic who gave the order could know or believe that Godo would not know how to *get under the building*? Can any stretch of the imagination cause this court to believe that in order to take a measurement for the construction of a tank in the wharf, which can be done by taking off a plank in the wharf and measuring from the building to the cap, that Godo would go under the adjoining building, take a chisel and hammer and cut a hole through the foundation? Can the court say by any stretch of the imagination that a man who knew what this Defendant in Error tes-

tifies and admits that he knew, would go upon an errand about which he knew nothing without making inquiry, and in the light of Defendant in Error's admissions can it be said by any stretch of the imagination that the master mechanic could know that Defendant in Error would not know as much about the condition as did he? Before the master can be held liable to warn, it must be shown that he not only knew of the danger but had reason to believe, exercising that reasonable care required of the master to the servant, that the servant had not the means of knowledge and of protecting himself. It would seem in this case that there has been a total failure of proof of any negligence on the part of the Plaintiff in Error.

If the order was given to Defendant in Error to go under the wharf and take a measurement, it was a general order and there was no haste, no command and no suggestion of route or method to be used, and it became incumbent upon the Defendant in Error to use all reasonable care in going about the execution of said alleged order, that the conditions would indicate were necessary to keep him from harm.

Consolidated Stone Company vs. Redmond,
55 Northeastern 454.

In this case it appears that Redmond was employed as a "wheeler" whose duty it was to wheel dirt, stone and rubbish.

“That while engaged in the work for which he was employed he was by the defendant, its agents and servants in charge of said quarry, ordered and directed to leave his said employment and to go and work under said channelling machine, and to obey the orders of the channeller,***** but that in giving said order the defendant and its agents in charge of said quarry and machinery carelessly and negligently failed to in any manner instruct the plaintiff as to the danger of the new situation, in working on said channeller and in adjusting the drills thereof in order to perform the work required of him.*****That, under his new duties it became necessary for him to without direct orders from any one, and without such orders he did, go upon the top of said machine and fasten or adjust such drills preparatory to letting them down in the groove.*****That by reason of his ignorance of such work and the danger incident thereto he placed his right hand in such a position on top of the channeller, that should the drill suddenly fall, the chain holding them would fall on his right arm; *****and instantly the drill and chain attached suddenly fell, caught his arm and injured it, and mashed and mangled it.”

In the opinion beginning at the bottom of page 456 we find the following:

“Turning to the interrogatories and answers a cursory review will readily demonstrate that the

facts thereby established preclude appellee's recovery, notwithstanding the general verdict. By these we find that appellee placed his arm beneath the chain to which the heavy drills were suspended; that he knew the drills were so suspended; that he held it there for a minute before the drills dropped; that he went upon the channeller without any specific command or direction of any one; that he was employed to do general work; that when he went on the channeller he selected his own position and his own mode of work; that he did not place anything under the chain to keep it from falling; that he did not perform the work he was doing in the manner that was ordinarily safest; that the accident occurred in daylight; that he had another and absolute safe way of doing the work so far as any danger of injury to his hand or arm was concerned. It is plain that the entire machinery with which he was working and the whole situation were open, obvious to appellee. He was bound to know that if he placed his hand under the chain, to which were attached drills weighing five or six hundred pounds, and the chain with such weights attached should fall upon it he would be injured. It was an open, obvious risk. He took no precaution to keep the chain from falling. He kept his hand under the chain for about one minute. He did not do the work in the ordinarily safest manner, and there was an absolute safe way of doing the work. There is noth-

ing in the record to show that appellant was under any legal obligations to give him special instructions or warning. A failure to warn or instruct creates no liability unless it is negligence and also such failure is the approximate cause of the injury. There is no negligence without a violation of some duty, and there can be no violation of a duty unless such duty exists. Under the facts specially found, it must be remembered that appellee was not ordered to perform extra-hazardous work outside of his employment; that, if there was danger in the service in which appellee was engaged, such danger was patent and obvious; that he chose his own manner of performing the service, and performed it without any command or direction of any one. Under such facts no duty was imposed upon appellant to warn or instruct him as to such danger.*****Concede for the sake of argument, that appellee was inexperienced in the work he was doing; yet appellant had the right to presume that he would exercise some degree of care to avoid injury, and that he would not place himself in a dangerous position unless such position was one which he was ordered to occupy.*****An employer is not liable for an injury to his employee that could not reasonably have been anticipated.*****We take it to be the law that if there are two ways of performing an act, one of which is attended with peril or danger, and the other is absolutely safe from danger the per-

son performing the act upon his own volition chooses the dangerous way and is injured, he cannot call upon his employer to respond in damages. *****Another well established rule is that, where danger is alike open to observation of all, both the master and the servant are on an equality and the master is not liable for any injury to the servant resulting from the dangers of the business in which he is engaged."

Defendant in Error testifies that he was ordered *to go under the wharf* and take a measurement, and that he did not know how to get there. He had been in the employ of Plaintiff in Error so long and was a man of such mature years and long experience that Plaintiff in Error had the right to presume, if the order was given, that he knew how to obey it and if he did not know the way it became his duty, as a reasonably prudent man, to inquire.

Sauer vs. Union Oil Company, 9 Southern (La) 566, in the opinion in this case, page 567 we find the following:

"The allegations of plaintiff's petition are that he was an employe of the defendant company; 'that he' was ordered by the foreman of said oil company to go and assist William Baker, also an employe of the company, in placing a belt on a meal crusher.*****The plaintiff introduced no evidence whatever relating to the accident, except his own oral testimony. The substance of that is, that he re-

ceived an order from the foreman, at a point remote from the meal crusher; that he received no instructions how to go there; that he selected his own route without inquiry, although he professes to have been ignorant of the surroundings; that he passed through and among the machinery of the mill; that in his own words, he 'crawled up' to a certain platform, where he was quietly standing, before he reached Baker or the meal crusher, when he was suddenly struck violently on the head by something which knocked him off the platform down to the lower floor.*****The defendant's witnesses prove that the route chosen by plaintiff was an improper and dangerous one, involving passage through machinery and over and under running wheels and belts, and that there were other proper and usual routes which were free from danger. Plaintiff claims that the foreman was guilty of negligence in not directing him how to go; but the proof shows that plaintiff had been working about the mill for a long time though he had been working in the interior only for two days prior to the accident. *Doubtless, the foreman supposed he knew or would inquire for the proper route, and surely, if he did not know, it was his duty to inquire."*

And the court in the above case held that no cause of action was proven and found for the defendant as a matter of law.

In the case at bar, the most that is claimed is

a general order to go under the wharf. Defendant in Error testifies that he didn't know how to get under, that he made no inquiry, chose his own route and in order to get under chose to go under the "wool-pullery," to stand under an elevator counterweight, thinking to find a place in the foundation of the building where he could cut a hole through with his chisel and take the measurement. No foreman could be expected to anticipate such foolhardy conduct on the part of an experienced millwright.

Lothrop vs. Fitchburg R. Co., 23 N. E. (Mass.) 227.

In this case the plaintiff was acting under general orders of the conductor of the train to do certain shackling on cars standing on the track, but the conductor gave him no specific directions to make the particular shackling which caused the injury complained of, but such cars were part of the cars standing on the side track and it was the duty of the deceased to do this particular shackling under the said general orders. There was a safe way to do the shackling but plaintiff chose the dangerous way and the court says:

*****The general rule of law is that when the danger is obvious and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by any one else, and when the servant has as good an opportunity as the mas-

ter or any one else, of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger.”

English vs. C. M. & St. P. Railway Company,
24 Fed. 906.

“Where, the servant has equal means of knowing the danger so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time and manner of doing the work, then, unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence.”

Weed vs. C. St. Paul M. & O. Ry Co. 99 N.
W. (Neb.) 827.

“A servant, who, from the length or character of previous service or experience, may be presumed to know the ordinary hazard attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of or inexperienced in the particular work.”

In the opinion at page 829 we find the following:

“*****The plaintiff was standing near, and the conductor ordered him to catch the car. That was the only order he gave. He left to the brakeman the determination of the question as to how the car should be caught. He knew that the plaintiff was a brakeman of many year’s experience; that he knew as well as he all about the danger of catching the car and the best method to be employed in doing so. He did not have time to instruct plaintiff how to execute the order, and if he had had time he would, as argued by defendant’s counsel, have made himself ridiculous by attempting to tell plaintiff how to do a thing which the plaintiff knew how to do as well as, and perhaps better, than he. In our view of the case the order given by the conductor was a proper one; and if so then negligence cannot be imputed to the defendant by reason of his having given it.”

This is merely another instance of a general order given and the servant adopting his own means to perform it, and there is no negligence shown and no liability.

The master has a right to assume in the case of an experienced man of mature years, who has been working around a particular factory for a long term of years, that such experienced servant, especially a millwright, who was as familiar with the plant and the repairs and the changes and the conditions as the superintendent himself, constantly

working around machinery when in operation, would use all available precaution to protect himself and further had the right to assume that if an order was given to such a servant and he did not know how to perform it, that the experience and mature years of the servant would cause him to make inquiries. The master is not compelled to be eyes and ears for the servant.

Harrison vs. Detroit Y. A. A. & J. Ry. 100 N. W. (Mich) 451, at 454 of the opinion we find the following:

“*****The employe is, as matter of law, held to have assumed the risk of all such dangers incident to the employment as he knows to exist or should have acquainted himself with.*****The rule is recognized by plaintiff’s counsel, but it is contended that in the present case the plaintiff should not be held to have assumed the risk for the reason that Harrison was not informed that the high tension wire came within one foot and six inches of the end of the trolley pole when placed on a direct line from the trolley stand and that the trolley pole was therefore in danger of coming in contact with the high tension wire while the attempt was being made to remove the pole; that it was not shown that Harrison was instructed or knew that it was dangerous to remove the trolley pole on the side of the car toward the high tension wire; that he was not instructed that if the trolley pole came within one-

half inch of the high tension wire electricity would arc.

Were instructions of this character essential before it be said that deceased assumed the risk? He knew of the fact that contact between the trolley pole and the high tension wire would be exceedingly dangerous. Indeed, contact between the pole and trolley wire with the pole removed from the socket was dangerous only in a less degree. He certainly knew that this wire was near enough to be reached by the trolley pole upon its being removed from the socket. Knowing, as he did of the high voltage in the conducting wires it would seem obvious that during the term of his employment he should have noticed that they were near enough to come in contact with this pole if the pole was directed toward them.

“*****The contention of plaintiff gets down to this; that he should have been told the precise location of this wire with reference to the top of the car and that the wire could be reached by a pole of the length of the trolley pole. These facts were open to his observations and to the observation of every employe who passed over this road.*****In the present case we think the danger was obvious and it was assumed, and upon this ground a verdict should have been directed for the defendant.”

So in the case at bar the Defendant in Error knew of the danger from getting under that coun-

terweight. He knew it had broken loose once and had fallen, and that it might break loose and fall again. He knew that after it broke it had been repaired, and he knew the usual way to repair it was to take a wind of the cable off the drum and then re-attach the weight to the cable. He knew that would naturally lengthen out the cable and let the weight come lower. A water boy would have known it was dangerous to stand between these uprights at any time. The condition was dangerous all the time when there was knowledge that the weight had once fallen and with that knowledge, the knowledge of a change having been made, a millwright of this man's experience who would deliberately stand between the uprights constituting the track upon which operated a seventeen hundred pound weight was guilty of gross negligence and certainly assumed the risk when he went there.

Williams vs. L. & N. Ry. 64 Southwestern (Ken.) 738.

In this case the court quotes with approval from Thompson on Negligence as follows:

"If the servant knows or by the exercise of ordinary observation could discover that the premises in which he is to labor are unsafe or unfit in any particular and if, notwithstanding such knowledge or means of knowledge, he voluntarily continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus

known or discoverable and to waive any claim for damages against the master in case it shall result in injury to him."

Again in said opinion the learned court quotes with approval from Bailey on Master's Liability for Injury to Servant as follows:

"The servant must use reasonable care in examining his surroundings to observe and take such knowledge of dangers as can be obtained by observation. If he fails to do so, the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes and if the defect is obvious and suggestive of danger, knowledge on the part of the servant will be presumed. The duty of the master in such cases is not to see that the servant actually knows. He has a right to rest upon the probability that anybody would know what was generally to be seen by his own observation. Negligence in a servant often consists in failing to know as well as in failing to do, and such is always the case when it is his duty to inform himself and know."

In this case when Defendant in Error received the alleged order, if he did receive it, and did not know where to go or how to execute it it certainly became his duty to inquire and inform himself. Nobody, however, commanded him to go under the building. He does not so contend. Nobody told him to go any place that would take him under the

counterweight. No order was given, nor is it so contended, that in itself would suggest any remote degree of danger. By his own choice, by his own failure to inquire, by his own carelessness, by his own failure to use the knowledge he had, and to use his God-given senses he was injured. He should not be permitted to mulct his employer for damages in such a case.

C. I. & L. Ry. Co. vs. Tackett, 71 N. E. (Ind.)
524:

“Where plaintiff in an action for injuries resulting from a defective brake averred that he did not know and could not see or know the brake was out of order, it was necessary, to sustain the allegation, that the evidence show that he had no knowledge of the defect, and could not have known of it by the exercise of ordinary care.*****.

“Where defects in appliances are such as to be obvious to a person giving attention to the duties of the occasion, the employe is required to observe and avoid them, and may not rely upon a ~~presumption~~ ^{presumption} against his own senses.”

In the opinion the court says, page 527:

“To sustain the allegation it was necessary that the evidence show not only that he had no knowledge of the defect and the danger, but that he could not have known it by the exercise of ordinary care**** That he did not know the danger to which he thus

exposed himself must be taken as an established fact, but that, in the exercise of reasonable care, he would not have known it, is a different proposition. That he did not know it is a fact consistent only with his failure to use his eyes and opportunities for his own protection. Such failure on his part prevents a recovery against the employer as effectively as would the possession of the knowledge which he might thus have acquired. The mutual right of the parties depends upon the actual facts connected with appellee's injury."

Evansville & R. R. Co. vs. Barnes, 36 N. E.
(Ind.) 1092.

In this case in the opinion on 1092 the law is well stated thus:

"*****It is an elementary principle of law governing the relations of master and servant that when a servant enters upon an employment which is from its nature necessarily hazardous, the servant assumes the usual risk and perils of the service, and this is especially true as to all those risks which require only the exercise of ordinary observation to make them apparent. In such cases, this is an implied contract on the part of the servant to take all the risks fairly incident to the service and to waive all right of action against the master for injuries resulting from such hazards. This waiver includes, on the part of the servant, all such risks as from the nature of the business, as usually and ordinarily

conducted, he must have known when he embarked in the master's service, and also those risks which the exercise of his opportunity for inspection, while giving diligent attention to such service, would have disclosed to him.

McGlynn vs. Brodie, et al, 31 Cal. 377.

"If an employe works with or near machinery which is unsafe and from which he is liable to sustain injury by reason of its being unsafe, *with the knowledge or means of knowledge of its condition*, he takes the risk incident to his employment and cannot maintain an action against his employer for injury sustained by reason of the defective condition of the machinery."

In the case at bar, can it be contended seriously that with the knowledge Defendant in Error had, that he did not have the means of knowledge at his command to know the exact condition of the counterweight? He knew it had broken. He knew it had been repaired and he knew the customary method of change or repair would permit the counterweight to come lower. If he used his faculties and the means to know for his own protection there was no need of warning.

Sievers vs. Peters Box & Lumber Company,
50 N. E. (Ind) 877.

In the syllabus of the above case we find the rule stated thus:

"Where plaintiff employe, by the exercise of or-

dinary care, would have known that a freight elevator was not provided with safety appliances, he assumes the risk attendant to carriage on it."

In the opinion at page 878 we find the following:

"***** Appellant knew, prior to his injury, that a new freight elevator was in process of construction, and he did not know or have any reason to believe that it had ever been operated before the day he received his injuries. Said appellant was a practical carpenter, of many years' experience, and said elevator was so constructed that it was apparent to any person of ordinary intelligence, looking at the same, that it was intended to carry freight only, and not passengers; and appellant could, by the exercise of reasonable care at the time he went on said elevator, have discovered that said elevator was intended for carrying freight only, and that the same was not provided with dogs, clutches, and brakes. There were safe and suitable stairways provided by appellee for appellant and other employes to go from the first to the third floor of said factory, and the new addition thereto; and appellant had frequently used the same, and was familiar with them and their use for going to the place where he was working on the day of his injury, and the appellant had no duty to perform with reference to said elevator, and could have gone safely to his place of work at the time of the injury

without going upon said elevator, and could have performed all of his duties for which he was employed by appellee without going upon said elevator.

*****The jury also found that appellant, by the exercise of ordinary care, would have known that the elevator was not provided with such safety appliances as dogs, clutches, or brakes. Under such circumstances, even if appellant rode upon the elevator at the invitation of appellee, he assumed the risk incident to carriage upon it."

Hardy vs. C. R. I. & P. Ry Co., 115 Northwestern (Iowa) 8.

In the syllabus we find the following:

"A master may presume that an adult servant is competent, and that he appreciates the dangers ordinarily incident to the work.

"An obvious danger, with reference to the character of the employment, is one that is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety.

"An employe, engaged in blasting, who knows, or ought to know, the danger in charging a hole with powder within a few minutes after springing the hole, is not entitled of right to a warning; a master being under no duty of warning or instructing a servant as to dangers discoverable by the exercise of ordinary care, with such knowledge and judgment as the master is justified in believing that the

servant possesses.”

Swiercz vs. Illinois Steel Company, 83 N. E. (Ill.) 168. In the syllabus the Supreme Court of Illinois states the rule thus:

“If a master negligently gives an order in obeying which the servant is exposed to danger, which he would not otherwise encounter, the master may be liable for an injury sustained; but an order given to a servant in the ordinary course of his employment, though the act is dangerous, does not make the master liable for an injury which he could not be expected to anticipate.”

It is not claimed in the case at bar that the order was negligently given or that it was given as other than a general order to go under the wharf and take a measurement. There is no defect claimed in the machinery and no negligence charged excepting failure to warn, and there was surely no duty to warn this millwright to keep out from between the two guides in which operated the counterweight of seventeen hundred pounds which he knew had broken, had been repaired, and if repaired in the ordinary way, would be in the exact condition that it was when he carelessly stood beneath it and was injured.

Kerker vs. Bettenderf Metal Wheel Company, 118 N. W. (Iowa) 306.

This court lays down the rule in the following language:

“The duty of the master as to warning and instructing a servant arises only where he knows, or ought to know, the youth or inexperience of the servant.”

St. Louis I. M. & S. Ry. vs. Jamison, 113 S. W. (Ark.) 41.

“The fact that a foreman of railway section hands ordered one of them to break the bolt by which another of them was injured did not render the master liable, where he did not direct the manner of breaking it, and the order was not negligently or improperly given.”

Western Union Telegraph Co. vs. Burton, 115 S. W. (Texas) 364.

“A servant assumes the risk of all dangers resulting from the master’s negligence, the existence of which the servant knows, or could have learned by that degree of care which a prudent man would have used under the circumstances, so that if the servant knew that a wire was charged with a dangerous current, or was warned of such fact sufficiently to put an ordinarily prudent man upon notice that it might be, he assumed the risk of injury therefrom, and cannot recover therefor.”

In this case the facts show that the servant was ordered to do a dangerous piece of work. He could have ascertained the danger if he had taken the trouble. He neglected to do so and the court holds that he assumed the risk.

Brownwood Oil Mill vs. Stubblefield, 115 S. W. 626.

This case is one where a roustabout had been working a few days in an oil mill and had been given the position as oiler, taken to various places in the mill and shown how and where to oil and warned about certain dangers but not cautioned about that particular part where he was injured. The condition was open and apparent. In the course of the opinion the court says:

“*****The true test is, would a person of ordinary prudence, having his age and experience, placed in the same or a similar situation, have comprehended the danger and risk?*****

“Where the servant has equal facilities with the master for ascertaining the danger incident to the work in which he is engaged, he assumes the risk. *Or where the facts show that the servant is of mature years, and that the danger was open to observation to any man of ordinary mental capacity, and equally as apparent to the servant as to the master, there is no duty to instruct or warn the servant.******

“We cannot call to mind any fact, connected with the situation under which the appellee was injured, upon which a man of ordinary intelligence, and with the experience of the appellee, could have been enlightened by instructions from the foreman. It would be a foolish exaction to require the master to impart information which the servant knows be-

fore, and an injustice to hold him responsible for injuries resulting from ignorance of situations and danger which a person of ordinary prudence, under the particular circumstances should have known and avoided."

Plaintiff in that case had worked in mills where there was machinery, while not working with machinery had been in a position to observe. The court held that the employer had the right to assume that the servant would appreciate the ordinary risk. How much more true is it that when, as in the case at bar, the employer is dealing with an experienced man who is not confined to work on one machine or in one place but whose work took him to every corner of the plant and around every machine. The master should not be held in duty bound to instruct. If the master had ordered defendant in error to go *under the building* (which was not the order), knowing that defendant in error had worked under the building since the change was made and knowing that defendant in error had been in the employ of plaintiff in error for many years as a millwright and knew that a change had been made in the counterweight and that it had broken, and knew the weight of this massive counterweight, and the uprights which constituted the track for the counterweights being in plain sight, it would seem that the court was carrying the rule to an absurd extreme to require such a servant with such a knowledge to

be warned. But this servant was not directed to go under the building, if he was directed at all, but to go under the wharf, and certainly he cannot claim that by that order: first, that plaintiff in error had any knowledge that he had any intention to go under the building. Second, it cannot be contended that the master could conceive that this experienced man, with the knowledge he had, would go and stand under that heavy counterweight. Third, it cannot be contended that the master should know or anticipate that any man knowing that these guides were made for the counterweight to run in and knowing that a change had been made would deliberately go and stand under it. Fourth, nor can it be contended that the master should presume that any sane person knowing that a counterweight weighing seventeen hundred pounds which was suspended by a cable which had broken, and that the guides for the track or counterweight extended clear to the mud flats would go deliberately and stoop over and stand right beneath that counterweight. Fifth, nor can it be contended that the master should anticipate a millwright of defendant in error's experience, knowing the cable had broken, that the counterweight had fallen, that the weight had been reattached to the cable, and that the usual and customary way for repairing the break was the identical way in which the break was repaired, would go and stand under that counterweight. Sixth, nor can it be contended

that the master should anticipate that a servant having worked in close proximity to this counterweight after it was changed and having his opportunity to know of the change, and having been advised of the break and the repair would go voluntarily and stand between the guides in which operated the counterweight weighing seventeen hundred pounds.

Before the master is under any duty to instruct the servant he must have good reason to believe that the servant does not know of the danger or that the danger is hidden or is so concealed that the servant, by the use of ordinary care, cannot protect himself. In this case after the order was given which was a general order to go under the wharf and take a measurement, *Defendant* in error says he did not know how to go. He was a man of mature years and a millwright experienced in the business, and yet he failed to inquire, selected his own route, failed to observe conditions of which he certainly had warning, in the light of his testimony, ~~then~~ he should not now be heard to say that the master was negligent in failing to warn him.

Horan vs. Gray & Dudley Hardware Company, 48 Southern (Ala.) 1029.

In this case in the opinion we find the following :

“Plaintiff claims of defendant \$10,000.00 as damages for, that, on, to-wit, the 4th day of January, 1905, plaintiff was the servant or employe of defendant and engaged in the discharge of his duties

as such servant or employe, which duty was to go into the basement of a certain school building in Woodland, Alabama, to take measurements for cold air pipes to a furnace which was being placed in said school building by defendant through its servants or employes. Plaintiff avers that in fitting said furnace in said school building or preparing for its use or operation, defendants' said servants or employes acting within scope of their authority dug or excavated a ditch or hole in the cellar or basement of said school building near or adjoining said furnace, which ditch or hole was uncovered without guard or signal showing its excavation, and without anything to warn of its danger and which said ditch or hole was dangerous to any one working in said basement or cellar near said furnace and without knowledge of the existence of said ditch or hole. Plaintiff avers further that defendant's foreman, Ollie Chaddock, who had the superintendence intrusted to him and was then in the exercise of his said superintendence negligently failed to warn plaintiff of the excavation of said ditch or hole and as a proximate consequence of his negligent failure to warn plaintiff of the existence of said ditch or hole the plaintiff fell or stepped into said ditch or hole and injured, strained or broke his right leg or ankle."

One of the defenses interposed in that case was as follows:

“Defendant says that plaintiff proximately contributed to the injury complained of in this; *plaintiff knew that it was usual and customary in installing furnaces and heating plants in buildings in many instances to dig a ditch or make excavation for the cold air pipe or other pipes connecting with said furnace*; and hence plaintiff knew or ought to have known by reason of that fact, that there was or might be a ditch or excavation in said basement, and without making inquiry as to the excavation of said ditch or excavation and without light negligently went into said basement.***** If the plaintiff had knowledge of the danger or the exercise of ordinary care could have known of it then defendant was under no legal duty to warn him.”

Johanson vs. Webster Manufacturing Company, 120 N. W. (Wis.) 832.

In the syllabus the rule is stated thus:

“The duty of the master to warn the servant of hidden danger arises only when the master has some reason to believe that the servant is ignorant of the danger and needs to be warned and in case of an adult of apparent usual intelligence the master may assume that he has knowledge common to the great mass of mankind, unless informed to the contrary, and in such case need not specifically instruct the servant of the dangers.”

To the same effect is:

Cunningham vs. Bath Iron Works, 43 At-

lantic (Me.) 106.

Mugford vs. Atlantic G. & B. Co., 65 Pacific
(Cal.) 674.

*Newman vs. S. W. Telegraph & Telephone
Co.*, 47 S. W. (Tex.) 609.

Boston vs. Harvard Brewing Co., 67 N. E.
(Mass.) 356.

O'Keefe vs. John P. Squire Co., 74 N. E.
(Mass.) 340.

Quoting from the syllabus of the last mentioned case:

"A master, who told an experienced foreman to take men and clean a large room, which had not been in use for some time, and which contained a number of boxes, etc., had the right to assume that, in view of the nature of the work the workmen's experiences, and the obvious condition of the floor, no warning as to the defects in the floor was necessary."

Jackson vs. Missouri Pac. Ry. Co. 16 S. W.
(Mo.) 413.

Omaha Bottling Co. vs. Theiler, 80 N. W.
(Neb.) 820.

In this case the servant was put to work filling bottles with charged mineral water. The bottle broke injuring him. He claimed damages, the neglect charged being the failure to warn of the danger. At page 822 in the last column of the opinion the court says:

"There is another reason why the plaintiff is

not entitled to recover. The duty to warn him of the latent dangers, if any there were, was not an absolute one. The defendant was only required to do what a prudent master naturally would do under like circumstances. *****The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehensions of a boy of average intelligence 19 or 20 years old who had worked at the business for years and had recently been charged with the control and supervision of the bottling department of the defendant's establishment. It would indeed be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case. The plaintiff knew how the bottling business was conducted. He knew soda water and mineral water bottles would explode occasionally under ordinary pressure, and it is scarcely possible that he was ignorant of the fact that cider bottles would also explode under high pressure. That he was ignorant of the hazards of the business we cannot believe, and to hold that defendant should have warned him of such hazards would in view of the circumstances, be requiring it to conform its conduct to an unreasonable standard of care."

Would a prudent master under the facts disclosed in the case at bar have deemed it necessary to tell Godo that that counterweight came below the floor, in the light of the admissions of Godo as to his

knowledge of the condition and the change, in the light of the alleged order given? See also *Central Granaries Co. vs. Alt* 106 N. W. (Neb.) 418-419.

There is another feature of this case which is worthy of consideration. The Defendant in Error testified that he chose to take the route he did for his own convenience because he thought it was not quite as muddy or dirty as to go by another route under the portion of the building where he had formerly worked. (T. of R. page 94, 95.)

Hettich vs. Hillje, 77 S. W. (Texas) 641.

In the syllabus we find the following:

“The question of a master’s negligence in failing to provide his servant with reasonably safe place to work does not arise, where it is clearly shown that the servant himself selected the place at which he performed the work for convenience’s sake and without any order or suggestion from his foreman, whereas, the work could have been done elsewhere without incurring the danger incident to the performance of the work in the place chosen.”

Defendant in Error admits that if he had inquired he could have learned a safe way to do the work. He also admits that he knew the space under the building was open excepting the place he chose to go and that he had been under the Packing House and observed it but he chose to go this way of his own volition and for his convenience.

Bellows vs. Penn. & N. Y. Canal & Ry. Co.

27 Atlantic (Penn.) 685. The syllabus lays down the rule as follows:

“A railway company is not negligent in failing to inform one of its experienced engineers who has run over its road for many years, and who is appointed to instruct an engineer on another engine in all the physical peculiarities of the road, that such engine is several inches wider than the one he had been accustomed to handle; and he cannot, therefore, recover for injuries sustained by his head coming in contact with the iron work of a bridge while leaning out of the cab window watching his train, though he could safely have done so in his old engine.”

Smyth vs. Burgiss Sulphite Fibre Co., 74 Atlantic, 870. The syllabus in the last above case is as follows:

“An experienced millwright while repairing a machine was killed by stepping on joists on the floor in the rear of where he stood, when he moved back suddenly. The place was well lighted and the joists were in plain sight when he took his position in a place where employes went only to remedy defects in such machines. Everything was open to observation. Held, that it was unnecessary to warn him of such danger.”

In the opinion the court says:

“The only defect in the premises complained of is the presence of from four to seven pieces of hard pine joists at a point on the floor just in the rear of

where the deceased was standing. He was a mill-right of seven or eight years' experience in these mills, and the place was not one where employes would go except to remedy defects in the wet machines. The place was well lighted, the sticks were in plain sight when deceased took his position close by them and the claim was that he was injured by stepping upon or against them when he moved back suddenly upon the unexpected starting of the machine.

"Unless this was a danger which the ordinary man might think was such as to call for warning to Ouilette, the defendant's motion should have been granted. That no ordinary person would think of giving such warning to an experienced repair man seems plain. There was no concealed danger. Everything was open to observation. Ouilette must have known, the locality was not a regular work place, not one where people customarily went. It was clearly his duty to use his senses when going into such a place for the temporary work of making repairs. The defendant had the right to assume that he would do so and to take that into account in determining whether it was necessary to warn him."

Beique vs. Hosmar, 48 N. E. (Mass.) 338.

Quoting from the syllabus:

"The employer of an experienced workman is not rendered liable for injuries to the latter, who fell through an opening in a floor of a building under

construction, cut by authority of the contractor, by failure to guard the opening or warn the workman of the danger thereof, as such workman assumed the risk of his employment.”

In the opinion the court has the following to say:

“*****It appears, however, that the defendant and his superintendent knew for several weeks before the accident that the hole was there, and it is said that they should have covered or guarded it, or have warned the plaintiff of it. The plaintiff was an experienced workman. The building on which he was working was in the process of construction. Obviously, the condition of such a building is not a permanent one, but is liable to change as the necessities of construction require. An experienced workman must be assumed to know this and to have regard to it. It is one of the risks of the business in which he is engaged. To require his employer to warn him or to guard him against such a risk would be, therefore, to compel the employer to protect him from the risk concerning which, from the very nature of the case the employer would have no reason to suppose that the workman needed any warning or protection. *****Though the hole had been there several weeks there is nothing to show that the defendant had any reason to suppose that the plaintiff needed any warning or protection in regard to it.”

In the case at bar the track or guides in which the counterweight operated extended through the floor clear down to the mud flats and were put there in that manner for the very purpose of allowing the counterweight to come down. Defendant in Error knew in his experience as a millwright that cables will wear out and break. He knew that when that cable broke it would have to be reattached to the counterweight and the ordinary way of repair was to take a wind of the cable off the drum and re-attach the cable to the weight. This would naturally let the weight come further down in the guides or track which were already constructed for that purpose. Certainly this was warning enough to an experienced man who knew that a change had been made and knew what these guides or counterweight tracks were for.

Ryan vs. Chelsea Paper Mfg. Co. 37 Atl.
(Conn.) 1062.

In this case a radical change was made in a machine and the plaintiff was allowed to recover. However, in the opinion at page 1063 we find the following rule laid down:

“The rule of law applicable to these facts is plain. If the change in machine No. 2 was merely an ordinary adaption of the machine to the purpose for which it was made, which a skilled operator must be presumed to anticipate—such, for instance, as the slight change necessary to keep the felt bands

at proper tension—the risk of injury was one assumed by the plaintiff in accepting his employment. On the other hand, if the change was one unknown in the ordinary use of the machine, made to adapt it temporarily to a special and unusual purpose, calling for a difference in operation, and greatly increasing the danger, then it was the duty of the defendant to notify the plaintiff before requiring him to operate the machine in its altered condition.”

In the case at bar the most that can be said about the change in the length of the cable was that it simply brought into use the track which was already constructed and had been since the installation of the elevator for the very evident purpose of allowing the counterweights to come down. It was not an unusual or temporary use but simply an adaption of the track to the use for which it was constructed, and when Defendant in Error knew the track was there; knew the counterweight operated in it; that it had broken and the change had been made, we think a man of his experience should need no warning at the hands of his master.

Massey vs. Seller et al., 77 Pac. (Ore.) 397.

The above is an action wherein plaintiff went to the premises of the defendant on business and was rightly upon the premises and in the building of the defendants; that he went to the street to wait for the shipping clerk of the defendant, and testified as follows:

“** ’So I turned to go outside of the door, to get outside again. I came pretty near to the door, and looked in there. It was a little dark in there. I didn’t find him. I thought maybe I would find a water closet in there, because I wanted to go to the closet, and I made a step or two, and I went right in the elevator.’ Later he continues, relative to the same incident: ‘But when I got there I seen this dark place. I thought it was a closet, ***** It was very dark to me.’”

In the opinion on page 399, the court says:

“Now, if it was so dark in there that he could ‘see nothing,’ it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for the jury to determine, and the trial court very properly declared the result as a matter of law.

In *Johnson vs. Rambert*, 49 Minn. 341; 51 N. W. 1043, contributory negligence was imputed to plaintiff for not having looked where he was going in the light. Having entered a warehouse in which he had never been before, and meeting the defendant, he turned aside for him to pass, and in doing

so stepped off the head of a pair of stairs. It was held that the bare statement of the facts, together with the admission of the plaintiff that he could have seen the stairway if he had looked, and did not look, was proof inhibitory of his recovery. It was there observed that, 'while the plaintiff was permitted to pass through the wareroom into the store, he could not but know from the surroundings that the place *was not a passageway merely*, but that it was also largely, if not principally, devoted to the private uses of the proprietor connected with his business; and the plaintiff was not justified, either in closing his eyes as he went through, or in neglecting to observe where he went. He was not justified in assuming that the place was so free from obstacles and from the ordinary conveniences for business that he could move anywhere without paying any attention to the surroundings.' In *Bedell vs. Berkey*, 43 N. W., 308, the plaintiff attempted to enter a building by a way with which he was not familiar. To illustrate the condition, we quote from his testimony. He says: 'I saw a little light shining through here, ahead of me, just a dim light, and I walked up here, saw this light, took it to be an opening between the door, between the two sections, the middle and the north sections. I turned to my right, and, as I supposed was going through into this department through a door, and I stepped into a hole.' The court, in deciding that

the case should not have been left to the jury on account of the contributory negligence of the plaintiff, says, among other things: 'It was his business, if he found it (the room) obscure, to wait until his eyes got accustomed to the light before moving round at hap-hazard, without using any care whatever to know where he was going. No one has any right to endanger himself, or to disturb other people's arrangements, by moving round in the dark—if it is dark—in a strange room, into which he has entered of his own accord and without direction.' And in *Hutchins vs. Priestly, E. W. & S. Co.*, 28 N. W., 85, it was held *that it was contributory negligence as a matter of law for a person to attempt to pass heedlessly through an elevator shaft, supposing it to be a doorway.*"

Again toward the end of the opinion at page 400, we find the following:

"He could not have been injured if he had paid the slightest attention to where he was going, or if he had not bolted headlong into the dark corner. *He made no inquiry touching the object of his quest, and was heedless in proceeding in the dark without observing where he was going.*"

Buttle vs. Geo. G. Page Box Co., 56 N. E. (Mass.) 583.

In the syllabus the court lays down the following:

"Plaintiff, at work at a band saw, was ordered

to oil the saw while it was in motion. The saw was oiled by pouring oil from a can into an oil cup in front of and above the saw. He attempted to reach around from behind the saw, and his hand came in contact with the teeth. The saw was in plain sight, and plaintiff knew that it was in motion. Held, that defendant was not negligent in failing to warn plaintiff of the danger to which he was exposed."

A verdict was had for the plaintiff and the defendant appeals, cause reversed. Plaintiff claimed that he was taken from his regular work to do this oiling and that it was more hazardous and that he was not warned of the danger, but the court holds that the jury were not warranted in finding that the plaintiff was not capable of appreciating the increased danger to which he was exposed when he attempted to oil the saw, that everything was open and obvious.

In the case at bar the Defendant in Error knew the counterweights operated in the upright track or guides and knew it had been changed; knew the usual and ordinary way to make the change. The condition was open and apparent and there was nothing in the case brought out which would give the Plaintiff in Error any idea that this millwright was going to place himself directly under that counterweight.

Durrell vs. Hartwell, Williams & Kingston,
58 Atl. (R. I.) 448.

Quoting from the opinion:

“The declaration sets out that the plaintiff was employed by parties who were decorating a building in process of erection by the defendants as contractors. The defendants operated a temporary elevator, through openings left in the floors, for hoisting materials. The decorators used a staging, which was moved about as needed for their work. On August 26, 1903, the plaintiff was at work upon the staging, and it had been so placed as to project into the elevator well. The declaration also alleges that the elevator while in operation, hit the staging, knocking the plaintiff off and injuring him. Under these general facts, the declaration has four counts: (1) That the plaintiff was ignorant that the staging projected into the well, but the defendants knew, or by the exercise of due care could have known, that it so projected, and that they, without warning to the plaintiff, so operated the elevator that it was driven against the staging; (2) that it was the duty of the defendants to give notice to those at work on the staging when the elevator was about to be put in motion; (3) that it was the defendants’ duty to give notice, with the addition of plaintiff’s ignorance of the projection; (4) that it was the custom, in the operation of such elevators, to give notice. Three questions arise under these counts—the effect of the allegations of the plaintiff’s ignorance, the defendants’ duty of warning, and the alleged custom.

An allegation of ignorance amounts to nothing, when the circumstances stated show that the danger was obvious, and so must or should have been known to the plaintiff. *****In this case the fact that the staging projected into the elevator well was as obvious to the plaintiff as it could be to the defendants. He could easily have seen that a board overhung the hole in the floor. The operator of the elevator, three floors below, could only see the overhang, unless it was of a considerable extent, by sighting upwards, if there were anything to guide his sight. But if it were of considerable extent, it would be all the more apparent to the plaintiff.

As to the defendants' duty of warning, there is no sufficient allegation to charge the defendants with such duty. The plaintiff was not in the employ of the defendants. The staging in use was apparently that of the plaintiff's employer, but clearly it was under the direction of, and moved about by, such employer or his workmen, including the plaintiff, as required for their work. *The opening in the floors was of itself notice that the elevator was liable to come up there."*

If the opening in the floor where the elevator operates is sufficient notice that the elevator is likely to come up we submit that the presence of the guides or uprights which constituted the track of the counterweight was of itself sufficient notice to an experienced millwright that that track was built to

use and that the counterweight would sometime run thereon. And again if, as in the case last above cited, the opening in the floor was sufficient notice that the elevator would be operated, then in the case at bar where the Defendant in Error had been in the employ of the Plaintiff in Error for many years as a millwright, where his work took him all over the plant and not around any specific location, machine or appliance, and where, as he admits, and as one of his own witnesses also testified, he knew that the counterweight had broken from the cable; that it had been repaired and when he admits that the usual and ordinary and proper way to make the repair was to take a wind off the drum, which would naturally lengthen the cable and permit the weight to come lower, and when he admits that the guides were in plain sight and that he deliberately went and stood between them under this seventeen hundred pound weight, we fail to see wherein defendant in error had brought to this court a case where he was entitled to any warning.

Can this court say that any employer under the conditions shown by this record and as hereinabove recited would anticipate for a second that this man would place himself under that counterweight? Assume that Defendant in Error is correct when he says he was ordered to go under the wharf. It was a general order. He was not under any necessity of haste, was not directed to go any certain route

or in any certain manner to take the measure. He testified that when the order was given he did not know how to go under the wharf, and that he made no inquiry how to do so.

It certainly then became incumbent upon him in the exercise of the most ordinary care for his own safety to inquire how he should get under the wharf. He asked no one; he chose his own route and confessedly for his own convenience; he says it was muddy under the whole of the packing house and that by going through between these guides he could save himself a walk of from 15 to 20 feet extra; he knew that the whole space under the packing house was absolutely safe outside of the place he chose; he knew it was a dangerous place; he knew there was a changed condition and we submit that he deliberately placed himself knowingly and willfully between the two uprights which constituted the track in which the counterweight weighing seventeen hundred pounds operated; that he willfully assumed the risk and was guilty of the grossest negligence and we, therefore, urge that the judgment of the learned trial court be reversed and that this cause be dismissed or remanded to the lower court for a new trial.

Respectfully submitted,

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No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CARSTENS PACKING COMPANY, a
corporation,

Plaintiff in Error,

VS.

LOUIS GODO,

Defendant in Error.

UPON WRIT OF ERROR FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

Brief of Defendant in Error

STATEMENT.

The plaintiff in error, hereinafter called Company, owned and operated for the last several years, a large meat packing institution on the tide

flats in the city of Tacoma. The defendant in error, hereinafter called Godo, for convenience sake, had been in the employ of the Company off and on since about 1904 as a carpenter and millwright. The Company had for a number of years a glue house as a part of its plant where it manufactured commercial glue out of the different materials in its packing plant. This house was built upon piling over the tide flats, and the roadways and walks around the plant were also built upon piling like a wharf and in the evidence is called wharf. The filth and stuff from the glue or otherwise had accumulated under the building so that at the time of the accident and for a long time before, the mud, manure, water and filth varied in depth from ankle deep to hip deep (Rec., 116, 127, 142, 160). Some time before the accident to Godo, the Company was turning the glue house into a "wool-pullery," which needed some changes to be made in the building and additional appliances installed. The building had in the northwest corner (before the new addition was put on), an elevator for the purpose of taking material to the different floors above. The counterweights of the elevator were located immediately to the south of the elevator well and ran up and down through the partition on the west side of the building, upon guides. This elevator was installed in about 1906. The counter balance weights weighed about 1700 pounds, and up to the time of the breaking of the cable, hereinafter described, the

bottom of the weights came down to within six or seven inches of the first floor of the building. The guides to the weights extended down through the floor and about to the joist which rested upon the mud flat (Rec., 63, 64, 139). Godo was familiar with the fact that the weights did not pass through the floor of the building, because in 1906, after the elevator had been installed, he boarded up the weight shaft from the first floor up to the second floor (Rec., 64, 65). Between the 15th and 20th day of April, 1911, the Company undertook to place in the building a wringer, and it became necessary to build a cement foundation down in the mud. This foundation was located a few feet to the southeast of the space where the counter balance weights would pass if projecting down through the floor of the building. Godo and another millwright were instructed to go down and build the forms for the concrete foundation. Before they could go to work, it was necessary for the laborers to dip out of the place or pit where the foundation forms were to be placed, the filth, water and mud, which was done by the laborers pouring the same into a trough made out of 1x12 boards and which extended from the wringer foundation place through and between the two guides extending down through the floor, and the water and filth was poured through this trough out to the west of the elevator shaft (Rec., 65, 66, 67, 81, 87). While the men were clearing the pit, Godo and his partner at work, sat on the trough about half an

hour (Rec., 86). The elevator went up and down during that time (Rec., 88), but the weights did not come down below the floor (Rec., 86). If it had, it would have crushed the box (Rec., 90). At that time the Company had not yet commenced the addition to the glue house (Rec., 189). At the time of making the foundation for the wringer there was a platform on the west side of the building which extended up from the wharf about three feet and in order to get under the building the man went through a door about twenty-five feet to the south of the northwest corner of the building. During the latter part of April or the first part of May, just before the commencement of the work of erecting the new addition by the Company, which is shown on Exhibit "A" to the west of the old building (Rec., 18, 145, 147, 149, 150), the cable to the counter-balance weights broke about six inches from the eye and the weights went down through the floor, breaking the cross piece or mud sill and burying all but a small portion of the weights in the mud. When the men went in to repair the cable, they had to put planks on the mud on both sides of the weights in order to do the work necessary to raise the weights out of the mud. These planks were left there so that they made a sort of walk through the space where Godo got hurt (Rec., 142-43). At that place it was between three and four feet from the floor or joist upon which the floor rested to the mud (Rec., 143). A person in a stooping position could pass through

between the guides and where the weights come down and passed into the mud (Rec., 143). In making the repair they took one wrap of the cable from off the drum, which made the line about 94 inches longer, and with the amount broken off and the amount of line necessary to make the wrap through the eye and tie taken off, the 94 inches produced the weights down through the floor to within six or seven inches of the mud sill instead of at the level of the floor as before (Rec., 186-87). Soon after the repair of the cable, the Company proceeded to tear away the platform to the west of the building and built on the addition which is shown in Exhibit "A." This addition extends about thirty feet to the west of the main building and at the time of the accident in order to get under the main building, one would have to crawl through the space on the north side of the new addition and just to the west of the elevator shaft or crawl the length of the new building on his hands and knees as the new addition extended out over the wharf. Peter Cornils was the master mechanic in charge of the work of repairing the cable (Rec., 19 and 67). On the 27th of May, the Company wanted to instal a vat immediately to the north of the building and a few feet to the east of the elevator shaft. Master Mechanic Cornils ordered Godo "to go down under the wharf and take the measurements for that tank" (Rec., 67, 68, 69, 70, 156, 95). Godo wanted to take up one of the planks at the place where the tank was

to be placed and Cornils would not let him do so, telling him: "If Tom (Mr. Carstens) sees you pulling up the wharf, he will give you hell" (Rec., 96, 97, 98, 99). Godo thought he had to do as he was told (Rec., 97).

Godo procured a hammer and chisel to cut a hole in the partition and a 20 foot stick to make the measurements with; and also a candle and some matches to produce a light as it was dark where he would have to work (Rec., 67, 70 inc. and 102). In order to go to the place for measurement, it was necessary for him to crawl under the new addition through the place at the north end of it and just to the east of the elevator well, and as the sill of the wharf at that place was within 6 or 7 inches of the mud flat he was compelled to pass around to the south of the elevator well over to the east of the elevator well at the place where he was to take the measurements. He called his helper and they started to crawl under the addition, Godo leading the way. When Godo got to the opening where the counter-weights came down, he noticed the broken sill and he stopped to investigate what was the matter, whether or not it was safe for him to go under the building. He did not know what had happened down there since he was there at the time of constructing the forms for the wringer foundation (Rec., 110, 112). The counter-weights were up. He stopped at the opening in a crouching position on one of the planks which had been left by the other men, struck a

match so that he could see the conditions under the building, and while in that act, the counter-weights came down, crushing him nigh unto death and injuring him for life. There was nothing to indicate that the weights came down (Rec., 106-7). He never saw the weights come below the floor (Rec., 105). While he knew that the cable broke, and had been repaired (Rec., 83), he did not know that they had lengthened the line or cable in making the repairs, and of course was not warned of the change or the danger of the place (Rec., 107). There were planks nailed to the joists or posts to the south of the space where the weights traveled, which required going south fifteen feet through the manure, filth and slush, to go around the open space where the weights traveled and where Godo undertook to go through (Rec., 93, 94, 134). Beyond that fifteen feet it was open, "But my God, the dirt there was there to crawl through. A man has to go on his knees. He wants to go the shortest route he can" (Rec., 94). There is no evidence that Godo knew that the cable broke off close to the eye, or only a few inches of the cable was broken off. There is no evidence of any existing condition at the time of the accident that would suggest to Godo that the weights went below the floor. The evidence is that at the time of the accident he was taking care of himself, by inspecting the place, by trying to keep out of the filth without the least suspicion of the danger from the weights. Judge Cushman clearly stated the facts

and the law at the close of plaintiff's case (Rec., 171 to 174 inc.).

The Company's petition for new trial states the causes upon which it relied in the language of Rule 74, but no specification of particular error or errors relied upon are made; no specification of the particulars wherein the evidence is claimed to be insufficient as required by the rule.

There are several errors assigned in its assignment of errors but in its brief it waives all except the "insufficiency of the evidence to sustain the verdict."

ARGUMENT.

This appeal is brought by the Company for the purpose of having this Honorable Court set aside the verdict, and reverse the judgment and dismiss the case solely upon the plea of insufficiency of the evident. But, by way of if-you-don't-succeed-in-that-try-something-else, the Company finally concludes to ask for a new trial. On what, error? Oh, no. Just a new trial, that's all.

In the first instance this Honorable Court will hardly go into the evidence for the purpose of finding out whether there is sufficient evidence to sustain the verdict, and if not dismiss the case. The cause was submitted to the jury and it rendered its verdict in plaintiff's favor and all this Court can do is to ascertain whether or not there is any evidence to sustain the verdict, viewed in the most favorable light for the plaintiff below.

If there is a total lack of evidence the most this Court can do is to grant a new trial, not dismiss the cause.

Lillian F. Slocum, Executor, vs. N. Y. Life Ins. Co., case No. 20, of October term, 1912, decided by U. S. Supreme Court, April 21, 1913, defining the power of Federal Courts and the function of Judge and Jury in the trial of civil cases under the 7th Amendment to the U. S. Constitution, in part as follows:

“The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * * One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people.” And then coming to the clause, “and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law,” he continued (pp. 447,

448): "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."

In *Walker v. New Mexico etc. Railroad Co.*, 165 U. S. 593, 596, decided in 1897, where the amendment was again under consideration, it was said by this Court, speaking through Mr. Justice Brewer: "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative
* * * Now a general verdict embodies both the law and the facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court to grant a new trial if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it

appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact. * * *

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, decided in 1899, the subject was much considered, and, following a careful review of the prior decisions, it was said by Mr. Justice Gray, who spoke for the court: It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the Court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one

ordered to go under the wharf to take the measurements.

Sixth: That when he got under the building (new addition) he found he could not get under the wharf at the place he crawled under the building, and it was necessary for him to go under the wharf or to make the measurements under the wharf, to go around to the east of the elevator shaft and cut a hole through the plank at the place where the tank was to be put in.

Seventh: That in order to go around to the east side of the elevator shaft and not go through the space where the weights passed up and down, it was necessary for him to go some fifteen feet to the south, around the planking; that the filth was from ankle deep to hip deep and to go around the planking, one would be compelled to crawl on his hands and knees through that filth.

Eighth: That there was nothing present to indicate to Godo that the counter-weights came below the floor, or were liable to come below the floor at the time he went to pass through to the east of the elevator shaft; that due to the broken plank, he was investigating as to the conditions of the place below the floor of the building to see what was the matter.

Ninth: That nothing was done by the master mechanic to give Godo any knowledge or intimation of the fact that the counter-weights were then passing up and through the space below the floor.

Under these statement of facts there were only three questions to be submitted to the jury:

First: Did the Company provide Godo with a reasonably safe place in which to do his work; this point involves the question of notifying Godo of that danger created by the Company in their change and repair of the elevator?

Second: Did Godo assume the risk of the dangers from being struck by the counter-weight while passing through the space?

Third: Was Godo guilty of contributory negligence in not going through the mire and filth around the planking and in attempting to go through the space where the weights came down?

All of these questions were properly submitted to the jury by the trial court. Every phase of the theory of the Company was put up to the jury for them to decide, and upon every phase of the case there was a conflict of testimony and it was the province of the jury to determine. They have and must have decided the facts as above outlined. The Company presents nothing but an argument on points of fact and issue. Where there is a conflict of testimony this Honorable Court, with all of the Courts, has held that a new trial will not be granted.

The rule of safe place needs no citation of authorities. It is very well crystalized and understood, as said by this Honorable Court in *Mining*

Co. v. Jones, 130 Fed. ⁸¹³~~821~~, and many other cases too numerous to mention.

It may not be negligent for the Company to have the weights run down beneath the floor, but if the weights are running through a space where men, using ordinary care and without knowledge of the fact of the danger, are wont to go, then the Company has not fulfilled its positive duty to its workmen, in allowing them in their course of employment to go through that place in ignorance of the danger, or permitting the place to exist to the injury of the workmen, when by reasonable care they could have provided against the danger. Now, in this case the Company could have provided against the danger in two ways : By informing Godo of the fact that since the repairs, the weight came beneath the floor, or by boarding up the space as they ultimately did. In other words, according to the long line of decisions, unnecessary to cite, was there a danger which reasonable caution could have prevented, and which the workmen did know? Under all of the facts of the case, this was a question for the jury, and evidence being adduced, sufficient to sustain the finding of the jury, that there was a danger which could have been averted, we submit that the citations of all of the authorities is unnecessary. Chapter 23 of Labatt has been cited by the Company and the synopsis of many cases have been printed in the brief bearing on the question of obeying direct orders. In nearly all

of these cases the danger was known, but disputed as between the master and the workman, and in no well considered case will you find any deviation of the rule of safe place where the workman is ordered into a place to work, which has been made dangerous through the acts of the employer. It is negligence in not providing a reasonable safe place, and the question of assumption of risk and contributory negligence do not make it less negligent on the part of the employer but tends to relieve the employer from liability. The point where the question of ordering Godo into this place, is through the fact that this was not Godo's regular place of work and he was ordered down in this place to perform a special, peculiar, piece of work, and he had a right to assume that there were no more dangers than what he could see or knew of; and if the Company had created a danger, unknown to him, it was the positive duty of the Company to inform him of that danger or have the conditions such, that there would be no danger.

Mitchell vs. Ry., 197 Fed. 528. Mitchell was killed while carrying a door across a railroad track and while resting on the railroad track with the big door, a train unknown to him collided with the door and killed him. The question as to assumption of risk was certainly for the jury. It is not enough that you can suspect that someone might have discovered the danger. The question is, did Godo know. This is especially so under the recent ruling of this Honorable Court in *Williams vs.*

Mining Co., 200 Fed. 211. Williams was injured through coming in contact with a wire carrying 500 voltage in a mine. He did not know of the high voltage, but knew that he might get "stung." I take it that the above case is somewhat stronger against the workman than the case at bar.

Was Godo guilty of contributory negligence in not going on his hands and knees through the filth and mire around the plank to the south of the weights instead of going through the open space in a more direct route? That involves, of course, the question, to a certain extent, as to whether or not Godo knew of the danger from the counterweights. This also involves the question as to the duty of the defendant Company in informing Godo or making the place reasonably safe. The Court remarked in denying the motion for directed verdict, that it seems very funny that the Company would require men to crawl on their hands and knees through filth a distance of fifteen feet, when there is no evidence of any knowledge on the part of Godo of the necessity of enduring such conditions any longer than possible.

"Whether a reasonable prudent person would have taken the safe way may depend upon the situation and the circumstances, the accessibility and the proximity of the safe way, the difficulties and obstructions to the use of the safe way,"

are questions to be decided under all the evidence

in the case. *Great Northern Ry. v. Thompson*, 199 Fed. 395.

I take it that under all of the decisions of this Honorable Court and of the Courts at large, there is no law question in this case. Every question was a jury question and there can be no error in the submission of such questions and the judgment should be affirmed.

Respectfully submitted,

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In the United States Circuit Court
of Appeals for the Ninth Circuit

CARSTENS PACKING COMPANY,

A Corporation,

Plaintiff in Error,

vs.

LOUIS GODO,

Defendant in Error.

No. _____

Reply Brief of Plaintiff in Error

Upon writ of error from the United States District Court for the Western District of Washington, Southern Division.

REPLY ARGUMENT

On account of inaccurate and misleading statements in the brief of defendant in error we deem it not out of place to file a short reply thereto.

Many of the statements found in the statement of the case by defendant in error are not supported by the record.

I. It is asserted "the guides to the weights extended down through the floor and about to the joists which rested upon the mud flat."

The record shows that at all times and to the knowledge of Godo these guides for the counterweights to travel in "ran clear down in the mud," (Godo's testimony, Record, page 107) and hence Godo knew that the construction contemplated the operation of the counterweights to the mud.

II. It is asserted "these planks (used by the men in repairing the cable) were left there so that they made a sort of walk through the space where Godo got hurt."

To support this statement counsel refers to Record, pages 142-143, but there is nothing of this kind to be found at this reference or elsewhere in the testimony.

The testimony is that in doing the work the men put down planks to stand on, but there is not a syllable of testimony from Godo or any one that these planks were there when Godo was hurt, but, on the contrary, Godo testifies that he knew of no work having been done under there. (Record, page 95.) That he had never been under there and knew of no one that had and knew of no occasion for any one to go under there. (Record, page 96.) And his helper, Nels Olson, testified that it was muddy all under the building; that he knew of no one going under where he and Godo went and that the place under the coun-

terweights did not have the appearance of any one having been there. (Record, pages 127-128.) There is no foundation in the record for counsel's statement or theory of a walk-way; there was certainly nothing to invite Godo to use that way as will clearly appear by reading the testimony of Godo and his helper, Nels Olson.

III. It is asserted that it was dark where Godo would have to work.

It is no doubt true that back under the building where Godo intended to cut through the foundation it was dark, but the court should not infer from counsel's statement that it was dark under the counterweights, for Godo testified to the contrary. He testified that it was daylight; that he could see the place where the counterweights ran; could see the lead taps and knew that it was the counterweight track and could see the space ahead (Record, page 101); that he was lighting his candle to see the space beyond the counterweights and to examine a broken joist under the counterweights. (Record, page 112.) He stooped under a 1700-pound weight operating overhead, through a track that ran down to the mud, to light his candle.

There was sufficient light to observe the general surroundings, the counterweight space and track through which the counterweight operated, but it was dark ahead. Godo certainly selected a rather unfortunate place under this 1700-pound

weight to stand while lighting his candle for his further journey!

He was not invited to stop there; was not invited to pass through this space; was not even invited to go under the building. He was told to get a measure from the building to the next cap outside of the building where a vat was to be let into the wharf, and as he says was directed to go under the *wharf* for that purpose. (Record, page 91.)

It was not known that he was going under the building, much less that he would attempt to pass under the counterweights and to stop under there to light his candle; nor was it known that he was going to provide himself with a candle or to attempt to cut a hole through the foundation of the building to stick a pole through. He chose his own route and method and made no inquiry. (Record, page 95.)

IV. It is asserted "when Godo got to the opening where the counterweights came down he noticed the broken sill and he stopped to investigate what was the matter, whether or not it was safe for him to go under the *building*. He did not know what had happened down there since he was there at the time of the construction of the forms for the wringer foundation." A fairer statement would have been that Godo knew the entire under part of the building was open; that he went under the counterweight knowing the weights were operating above him;

that he stopped under these weights to light a candle; that he knew that the counterweight cable had previously broken. He could see that the track extended to the mud. He could see the broken mud sill crushed by a previous fall of these weights, falling through the space he selected to stop. Knew the cable had been repaired and knew that the way to repair the cable was to take a wind off the drum and reattach the cable and that in all probability it would allow the weights to drop further. (Record pages 107-108-109-110-111)

V. It is asserted "while he knew the cable broke and had been repaired he did not know that they had lengthened the line or cable in making the repairs. *****There is no evidence that Godo knew that the cable broke off close to the eye or only a few inches of the cable was broken off. There is no evidence of any existing condition at the time of the accident that would suggest to Godo that the weights went below the floor."

It would seem that knowing the cable had broken and knowing from his experience as a millwright that the proper and usual way to repair the same was to take a wind off the drum and reattach the cable to the counterweight which would, in the ordinary operations, lengthen the cable and allow the counterweights to come further down, that Godo was not exercising much precaution when he stood under this heavy weight, without knowledge as

counsel argues whether or not this cable had been lengthened in making such repairs. The guides were there for such lengthening and for use of the counterweights if the cable should be lengthened. Knowing these things Godo should not shut his eyes and stand under this weight without knowing or inquiring the nature of the change in view of the fact that he knew a change had been made and knew the proper and usual method of making such change and further knowing that no one knew he was going under the building or was going near these weights.

It is now, for the first time, argued that the negligence of the master consisted in not furnishing Godo with a safe place in which to work.

This is not the negligence alleged in the complaint.

The master did not direct Godo to this place; did not know that he was going there. No one had used this space as a passageway and no one expected it to be so used. Godo had no work there to perform so far as the master had any knowledge. It was not a place of work or a passageway, the entire under part of the building was open, but the master had no knowledge even that Godo was going under the building.

It is now argued that it was negligence in the master to allow these weights to operate through a space where employes *are wont to go* without either warning the employes of such operation or boarding

up this space where employes *were wont to go*. There is no evidence that this was a space where employes *were wont to go* or where any employe had ever before this time gone. So far as negligence is charged for failure to board up this space, we reply that no such negligence is charged in the complaint.

So far as negligence is charged in failing to warn Godo we reply that it was not known that Godo would go under the building, much less attempt to pass under these weights, besides Godo knew that the space was open. He also knew the counter-weights operated above this space; knew that they had broken once and had fallen through this space and crushed the mud sill; knew that they had been repaired and that the usual and proper method of repairing would ordinarily result in lengthening the cable.

Godo knew of the change, knew that he was going under the building, which fact the master did not know, then if Godo did not know the nature of the change in the weights he should have inquired. But he evidently did not think an inquiry necessary nor did the master deem a warning necessary regarding a danger the master had no knowledge that Godo would encounter. Godo was an experienced mill wright; knew of the change and the usual and proper method of making it.

We will briefly review the cases cited by counsel for defendant in error.

The first case he cites, *Lillian F. Slocum, executor, vs. New York Life Insurance Company*, Case No. 20, October, 1912, United States Supreme Court April 21, 1913, is one wherein the court holds that where there is evidence to sustain the verdict the court should not usurp the functions of the jury. But so far as counsel quotes from the case in his brief we fail to find any intimation that the Supreme Court of the United States has held that where there is a total failure of proof of negligence the court should not direct a judgment. When the facts are undisputed their legal sufficiency becomes a question of law for the court, and this has always been the rule. If plaintiff brought suit to recover a debt and failed to introduce any evidence of the debt it would certainly be the duty of the court to direct a verdict and if the lower court did not do it, it certainly would be the duty of the appellate court to direct a verdict or to grant a non-suit as the case might be. The proposition in the case at bar is, as we read the record, from the evidence of the defendant in error himself, that no negligence whatsoever on the part of the master was proven.

The next case cited by defendant in error is *Bunker Hill & Sullivan Mining Co. vs. Jones*, 130 Fed. 813. In that case a miner was sent to a specific place to do a specific work and the rock above him had not been properly timbered and fell on him. It was the duty of the master to protect this roof and

the court held that when the defendant sent its servant into that place to work and failed to perform that duty it was guilty of negligence; that there was no duty upon the servant to inspect that which did not come within his line of work to see if the master had performed his duty. In the opinion at *page* 818 the court says:

“*****The shift boss, whose orders he was obliged to obey, indicated the place in which he was to work; directed the number of holes to be drilled in the breast of the tunnel and that the blast should be fired at noon. He entered upon the performance of his duties and was warranted in the assumption that the necessary precautions had been taken by the defendant to prevent the caving and falling of rock from the stope above. As was said by the court in *Railway Company vs. Jarvi*, *supra*, comparing the relative duty of master and servant;

‘Of the master is required care and diligence in the preparation and subsequent inspection of such a place as a room in a mine that is not, in the first instance, demanded of the servant. The former must watch, inspect, and care for the stopes through which the servants work, as a person charged with the duty of keeping them reasonably safe would do. The latter has a right to presume, when directed to work in a particular place, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably

prudent and intelligent man, in the performance of his work as a miner, would have learned facts from which he would have apprehended danger to himself."

Again in the same opinion at *page* 819 quoting from *Kelly vs. Mining Company*, 41 Pacific, the court says:

"*****Sheean (the foreman) was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place on his own judgment and at his own risk."

This case clearly is one where the master selected the place the servant was to work and was under a positive duty to make it reasonably safe and certainly has no application to the facts of the case at bar.

The next case cited by defendant in error, *Mitchell vs. Toledo St. L. & W. R. Co.*, 197 Fed. 528, in that case plaintiff was sent to assist in replacing a door on a car which car stood on one of a number of side tracks, apparently among a maze of side tracks and repair tracks. Two men were carrying this large door. When they had the door about a car's length from the car upon which they were to work an engine was sent in and bumped the cars and plaintiff was thrown under the wheels and killed. It was held the Company was negligent in sending him to this place to work and then make it suddenly dangerous.

The next case cited by defendant in error is *Williams vs. Bunker Hill & Sullivan M. & C. Co.* 200 Fed, 211. In that case the court in discussing the proposition where the plaintiff admitted he knew that he might get stung by the electric wire says:

“*****We might say here that there was knowledge of the danger yet no actual appreciation of the risk to which Williams was exposed, that is he knew of the danger by the exposed wire but he did not know of the risk of his action in touching it with a hose in his hand—in other words he did not appreciate the perils that surrounded him.”

So also in this last cited case the plaintiff was sent to a specific place to work.

In the last case cited by defendant in error, *Great Northern Ry Co. vs. Thompson*, 199 Fed. 395, the Railway Company had posted “no trespass” signs but had never enforced the rule against trespassing and knew that people were in the habit of crossing their tracks as a common travel way. A caboose was backed in on the track in the night time without lights or warning, the Company knowing that people were in the habit of going on these tracks as a common passageway. Held that plaintiff was entitled to recover for the negligence of the Company.

As we stated in our opening brief, the law requiring a warning to employes has grown up from and nearly every decided case is one where the employe was directed by the master to go to a specific

place which was dangerous or where the mechanical appliances, or the specific location where the servant was employed had been changed and made dangerous and the danger was not open and apparent to ordinary observation. These cases can surely have no application to the case at bar. The defendant in error testifies, as has been heretofore set out, that he was ordered *to go under the wharf*; that the wharf was outside of the building; that the foundation of the building extended clear down to the mud flats; that it was inconvenient and muddy to get under the wharf and finally he testifies that he didn't know how to get under the wharf. He didn't tell anybody, nor ask how to get there. He simply went and got a pole and a chisel and crawled, not under the wharf, but under the building. Surely if we take the order as the defendant in error swears to it, that he was ordered to go under the wharf, knowledge that he was going under the building cannot be imputed to the plaintiff in error. And furthermore there is nothing in this record to show that the master mechanic, or any one in authority, knew or had any idea that Godo was going under the building. He chose his own time, method and route. He knew the counterweights operated in the uprights or guides and it was so light that he could see the lead taps, as he called them, or counterweight uprights or guides. He knew the counterweight weighed 1700 pounds. He knew that previous to his going under there the

cable had broken. He knew that it had been repaired. He knew that some change had been made; he knew that it was a dangerous place; he knew that it was the only dangerous place under that building. He is a millwright and had worked around this very plant for many years. The very men who made the repairs on the cable and effected the change which permitted the counterweight to come lower were in the same crew and under the same foreman as Godo and testified that Godo knew the cable had broken and been Repaired. And we submit that even if Godo had been ordered to go under that building there was nothing to suggest to the master that a warning was necessary to this man of mature years and wide experiences as a millwright around this identical plant; but when he was not ordered under the building; when no one in authority knew he was going under the building, certainly there was no duty imposed upon the plaintiff in error to warn him not to go under the counterweights. We submit that there was no evidence of negligence on the part of plaintiff in error in the record and that this cause should be reversed and remanded to the lower court with direction that the same be dismissed or a new trial granted.

Respectfully submitted,

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